131-16.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. ~~1087.~~ 728

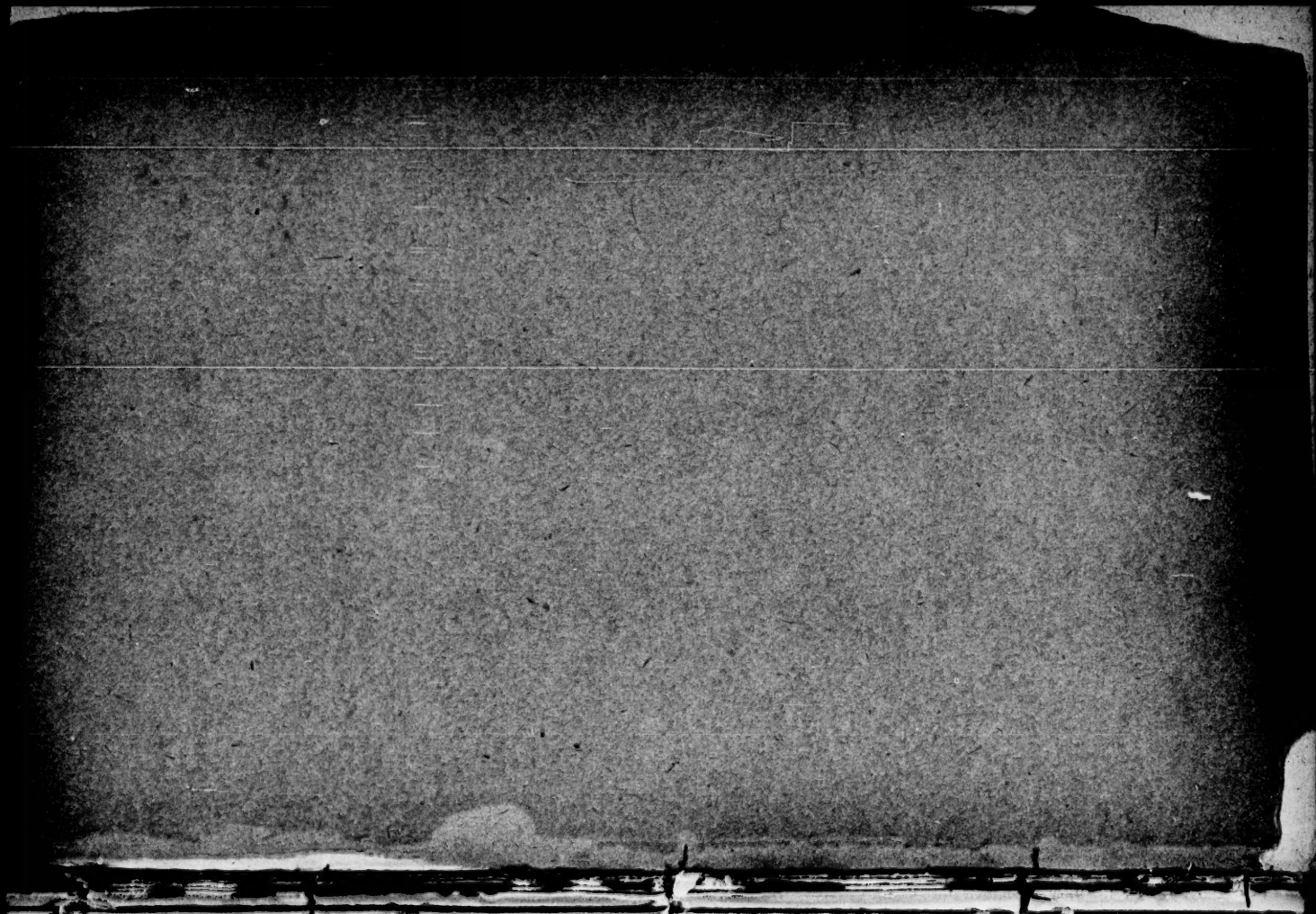
W. N. COLER, JUNIOR, PLAINTIFF IN ERROR,

vs.

THE CITY OF CLEBURNE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

FILED OCTOBER 1, 1887.



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1 MONDAY, *January 10th*, 1887.

Be it remembered that there was opened and begun to be holden a regular term of the United States circuit court for the northern district of Texas, at the city of Dallas, in Dallas county and said district, on the 10th day of January, A. D. 1887, it being the second Monday in said month in said year and being the day fixed by law for commencing a regular term of said court at said place—present and presiding, the Honorable Andrew P. McCormick, United States district judge for the northern district of Texas; C. B. Pearre, United States attorney for said district; W. L. Cabell, United States marshal for said district, and A. J. Houston, clerk of said court—when and where the following proceedings were had, to wit:

2 *Pl'ff's Original Petition.*

UNITED STATES OF AMERICA, *Northern District of Texas:*

To the hon. the judges of the circuit court of the U. S. for the northern district of Texas, at Dallas:

The petition of W. N. Coler, Junior, who is a resident and citizen of the city, county, and State of New York, complains of the city of Cleburne, a corporation created by and under the laws of the State of Texas, capable of suing and defending under its charter, and the county seat of the county of Johnson, of which said city Jas. Odell is the mayor and W. H. Graves is the secretary. Said city of Cleburne, the said Jas. Odell, as mayor, and said W. H. Graves, as secretary, are residents of Johnson county and citizens of said northern district of Texas, and the said city of Cleburne is styled defendant in this suit.

Plaintiff respectfully shows that heretofore, to wit, on the first day of January, A. D. 1884, the said def't, under and by virtue of article 420 of the Revised Statutes of the State of Texas, made, executed, and delivered 51 of its bonds of 1,000 dollars each, payable to the Texas Water and Gas Company or bearer in the city of New York at the expiration of 20 years from the date thereof, together with 7 per centum interest, payable semi-annually on the first day of July and the first day of January of each year thereafter, which said interest is represented by coupons for 35.00 each, payable to bearer in the city of New York, the said bonds signed by the
3 mayor and secretary of said def't and sealed with its seal and the said coupons also signed by the mayor of said city, said def't, and its secretary. Pl'ff shows that for a valuable consideration paid and in the due course of trade he became the *bona fide* owner, holder, and bearer of 44 of said coupons without notice of any equities or defenses thereto.

A substantial copy of one of said coupons is as follows:

"$35.00. On the first day of January, 1885, the city of Cleburne, State of Texas, will pay to bearer in the city of New York thirty-five dollars, being six months' interest due on water-works bond No. 1.

"W. N. HODGE, *Mayor.*
"W. H. GRAVES, *Secretary.*"

Stamped on the face of said coupon is the figure 2, which represents the number of the coupon; that each of said 44 coupons are like the one here set out excepting the number of the bond shown on each coupon; that each of said coupons is for 35.00, due January 1, 1885, payable to bearer past due. A list of said 44 coupons, showing number, amounts, & dates, is attached hereto, marked "Exhibit B," and made part hereof, and demand has been made for payment thereof, to wit, for 1,540 dollars of principal, and the same was refused, and the debt and interest at 8% since maturity is wholly unpaid, to the damage of 3,000 dollars to pl'ff.

In view of the premises pl'ff prays for process for service on said def't by serving the mayor or secretary of def't for judgment for
4 said debt, interest at 8% since maturity, and all costs of suit.

"(Signed) HERNDON AND CAIN,
Att'ys for Pl'ff.

Endorsed: No. 759. W. N. Coler, Jr., *vs.* The City of Cleburne. Plff's petition. Filed May 2, 1885. A. J. Houston, clerk, by Jas. D. Adams, deputy.

EXHIBIT "B."

No. of bond.	No. of coupon.	Date when due.	Amount.
2	2	January 1, 1885	35
3	2	" "	35
4	2	" "	35
5	2	" "	35
6	2	" "	35
7	2	" "	35
8	2	" "	35
9	2	" "	35
10	2	" "	35
11	2	" "	35
12	2	" "	35
13	2	" "	35
1	2	January 1, 1885	35
22	2	" "	35
23	2	" "	35
24	2	" "	35
25	2	" "	35
26	2	" "	35
27	2	" "	35
28	2	" "	35
29	2	" "	35

Exhibit "B"—Continued.

No. of bond.	No. of coupon.	Date when due.	Amount.
30	2	January 1, 1885	35
31	2	" "	35
5 32	2	January 1, 1885	35
33	2	" "	35
34	2	" "	35
35	2	" "	35
36	2	" "	35
37	2	" "	35
38	2	" "	35
39	2	" "	35
40	2	" "	35
41	2	" "	35
42	2	" "	35
43	2	" "	35
44	2	" "	35
			1,260
14	2	January 1, 1885.	35
45	2		35
46	2		35
47	2		35
48	2		35
49	2		35
50	2		35
51	2		35
			$1,540

Endorsed: Filed May 2, 1885. A. J. Houston, clerk, by Jas. D. Adams, deputy.

6 *Def't's Original Answer.*

In Circuit Court of the United States of America, Northern District of Texas, at Dallas.

W. N. COLER, Jr., *vs.* THE CITY OF CLEBURNE. } No. 759.

And now comes the def't in above-entitled cause, by its att'ys, Bledsoe and Fisher and Brown, Ramsey and Crane, — demurs to pl't'ff's petition, and says the same is insufficient in law to require def't to answer thereto; wherefore def't prays judgment of the court, &c.

And for plea in this behalf def't, by its said att'ys, denies all and singular the allegations in pl'ff's petition, and of this def't puts itself upon the country; wherefore def't prays judgment, &c.

And for further plea in this behalf def't, by J. M. Odell, its duly elected and legally qualified mayor, says that on the first Tuesday in

April, 1884, said J. M. Odell, at a legal and regular election held in and for said def't on said day for the election of mayor and other officers, was duly and legally elected to the office of mayor thereof for a term of two years; that he immediately thereafter qualified, as required by law, and has continuously filled said office and acted as such mayor and performed the duties thereof from that time to the present day.

And def't, by said J. M. Odell, its mayor, says that said entire series of fifty-one bonds and all coupons originally thereto attached, described in pl't'ff's petition, of which pl't'ff claims those sued on to be a part, are not the bonds, coupons, and obligations of def't, and

7 was not (as is alleged by pl't'ff) ever executed by def't in the way and manner prescribed by the laws of the State of Texas for the execution of such instruments, because def't says that the pretended bonds and coupons described in pl't'ff's petition never had any existence prior to the 3rd day of July, 1884; that said bonds and coupons were never signed by said J. M. Odell, the then legally qualified and acting mayor of def't, or by his authority or by any person authorized to act as such mayor, and that said J. M. Odell refused to sign the same; and def't says that although said pretended bonds and coupons on their face purport to have been made on January 1, 1884, and signed by the mayor of def't, in truth and in fact said bonds and coupons were made on July 3rd, 1884, and antedated and signed by one W. N. Hodge, a private citizen of def't, who had been formerly mayor of def't, but whose term of office had long prior to said July 3d, 1884, expired, to wit, on the — day of April, 1884; and def't avers that if said bonds and coupons have ever been registered in the office of the comptroller of public accounts for the State of Texas such registration was illegal and without any authority, because def't says that its said mayor, J. M. Odell, never forwarded said pretended bonds and coupons to said comptroller of public accounts, as is required by law, and never authorized any other officer of def't or other person so to do, and that its said mayor, J. M. Odell, never did furnish to said comptroller of public accounts a statement of the value of all taxable property,

8 real and personal, in said city def't, nor did said mayor furnish a statement to said comptroller of the amount of tax levied for the payment of interest on said pretended bonds and to create a sinking fund, nor did he ever authorize any other officer of def't or other person in his name so to do, nor was the same done by any person legally acting as mayor of def't; wherefore def't says that the instruments declared in pl't'ff's petition are not the obligations of this def't, and of this def't puts itself upon the country and prays judgment, &c.

(Signed) J. M. ODELL,
Mayor of the City of Cleburne.

THE STATE OF TEXAS, *Johnson County:*

Before me, the undersigned authority, this day personally appeared J. M. Odell, who, being duly sworn, on oath says that he is now the duly elected, qualified, and acting mayor of the city of Cle-

burne, Johnson county, Texas; that the facts and statements in the above and foregoing plea set forth and contained are true in substance and in fact.

(Signed) J. M. ODELL,
Mayor of the City of Cleburne.

Subscribed and sworn to before me this 16th day of May, 1885.
[SEAL.] (Signed) JOHN R. RANSOM,
Notary Public, J. C., T.

And for further plea in this behalf def't says *actio non*, because it says that at the time of the issuance of said fifty-one bonds and coupons attached thereto, described in pl't'ff's petition, of which
9 pl't'ff claims those sued on to be a part, to wit, on July 3, 1884, if the same ever were issued by def't, def't had an outstanding valid indebtedness, exclusive of said fifty-one bonds, and now has aggregating the sum of $26,695.25, exclusive of all interest, as follows, to wit: $1,695.25, bearing interest from date at rate of 8% per annum, represented by scrip issued to Gulf, Colorado and Santa Fé Railroad Company by authority of ordinance of def't enacted Sept. 17, 1881, to reimburse said company in money paid out for right of way in said city limits; $5,000, bearing interest at rate of 8% per annum, represented by scrip issued to Chicago, Texas and Mexican Central Railway Company by authority of ordinance of def't enacted Sept. 13, 1881, to reimburse said company in money paid out for right of way in said city limits, and $20,000, represented by 40 bonds of $500 each, bearing interest from date at rate of 8% per annum, payable semi-annually, due in five and twenty years, issued by def't for purpose of building city hall by authority of ordinance of def't enacted June 27, 1883, and that said indebtedness augmented by said fifty-one bonds aggregate- a sum of $77,695.25, which sum, def't avers, exceeded 6% of the taxable values of all property, real and personal, in said def't on said July 3, 1884, in the sum of $9,031.25, for def't says that the taxable values of all property, real and personal, in said city def't for the year 1884 only amounted to the sum of $1,144,400; wherefore def't says that the
10 issuance of said fifty-one bonds and coupons was, *ultra vires*, on the part of def't, and that said bonds are null and void, and of this def't puts itself upon the country and prays judgment, &c.

(Signed) BLEDSOE AND FISHER,
BROWN, RAMSEY AND CRANE,
Att'ys for Def't.

Endorsed: No. 759. U. S. circuit court. W. N. Coler, Jr., *vs.* The City of Cleburne. Original answer. Filed May 20, 1885. A. J. Houston, clerk, by Jas. D. Adams, deputy.

Order to Amend Answer.

MONDAY, *January* 11, 1886.

This day, upon application of defendant, it is granted leave to amend in this cause.

First Amended Answer.

In the United States Circuit Court, Fifth Circuit and Northern District of Texas, at Dallas, to January Term, 1886.

W. N. COLER, Jr., *vs.* THE CITY OF CLEBURNE. } No. 759.

And now comes the def't in above-entitled cause, by att'ys, and, by leave of the court first had and obtained, files this its first amended original answer amending its original answer filed herein on the —— day of ——, 1885, and for amendment thereto demurs to pl't'ff's petition herein, and says that the same is wholly insufficient in law to require def't to answer thereto; wherefore defendant prays judgment of the court, &c.

11 And for plea in this behalf def't, by its att'ys, denies all and singular the allegations in pl't'ff's petition contained, and of this def't puts itself upon the country; wherefore def't prays judgment, &c.

(Signed) BLEDSOE AND FISHER,
BROWN, RAMSEY & CRANE,
Att'ys for Def't.

And for further plea in this behalf def't, by J. M. Odell, its duly elected and legally qualified mayor, says that on the first Tuesday in April, 1884, said J. M. Odell, at a legal and regular election held in and for said city (def't) on said day for the election of city officers, was duly elected to the office of mayor thereof for a term of two years from that date; that he immediately thereafter qualified, as required by law, and has continuonsly acted as such mayor and performed the duties of such office from that time to the present day; and def't says that said entire series of fifty-one bonds and all interest coupons thereto attached, described in pl't'ff's petition, of which pl't'ff alleges those sued on to be a part, are not the bonds and coupons and obligations of def't, and was not (as is alleged by pl't'ff) ever executed by def't in the manner prescribed by the laws of the State of Texas for the execution of such instruments.

Because def't says that the pretended bonds and coupons described in pl'l'ff's petition never had any existence prior to the 3rd day of August, 1884; that they never were signed by said J.

12 M. Odell, the then legally qualified and acting mayor of said def't, nor by his authority nor by any person authorized by law to act as mayor of def't, the said J. M. Odell being at said time neither absent from said city, disqualified, or mentally or physically

unable to perform the duties of said office, and that said J. M. Odell, mayor as aforesaid, then and there refused to sign and deliver the same, and def't says that although said pretended bonds and coupons on their face purport to have been executed on January 1, 1884, and signed by the mayor of def't, in truth and in fact they were executed on July 3d, 1884, antedated "January 1, 1884," and signed by one W. N. Hodge, a private resident of said city and the immediate predecessor of said J. M. Odell, and whose term of office as mayor of said city had long prior to said July 3d, 1884, expired, to wit, on the — day of April, 1884; and def't avers that if said pretended bonds and coupons have ever been registered in the office of the comptroller of public accounts of the State of Texas such registration was illegal and without any authority, because def't says its said mayor, J. D. Odell, never forwarded said pretended bonds, with the certificate required by law in such cases, to said comptroller of public accounts and never authorized any other person or persons so to do, and that they never were forwarded by any person having authority to act as mayor of def't, and that no such certificate as required
13 by statute was ever filed with said comptroller as would authorize the registration of such bonds; and def't says that said pretended bonds and coupons were never delivered by said J. M. Odell, mayor as aforesaid of def't, or by his authority or by any person legally authorized to act as mayor of def't, to the Texas Water and Gas Company or to any person or persons whatever; wherefore def't says that the instruments declared on in pl't'ff's petition are not the bonds and coupons and obligations of this def't, and of this def't puts itself upon the country and prays judgment, &c.

(Signed) BLEDSOE AND FISHER,
BROWN, RAMSEY AND CRANE,
Att'ys for Def'ts.

And def't for further plea in this behalf says *actio non*, because it avers that if said fifty-one bonds and coupons attached thereto, described in pl't'ff's petition, and of which pl't'ff claims those sued on to be a part, were ever executed and delivered by def't, which it denies, the same were executed and issued in compliance with an ordinance enacted by the council of def't on the 13 day of Sept., 1883, and in compliance with a contract made by virtue of said ordinance between def't and the Texas Water and Gas Company of Tyler, Texas, on said date, by which ordinance it was ordered, and by which contract it was agreed, to issue to said Texas Water and Gas Company, upon the completion of a certain system of water works,
14 to be built by said company in and for def't, to be completed on or before June 1, 1884, fifty-one bonds of $1,000 each, bearing interest from date at the rate of 7% per annum, payable semi-annually, due and payable twenty years after date, which ordinance and contract def't avers were and are null and void; and def't avers that said bonds and coupons, if ever issued by its officers and agents, are in existence without authority of law, without power on part of def't to issue same, and thereby create a valid obligation against

def't, and are null and void, because def't says that at the date of said ordinance, said contract, and the issuance of said bonds and coupons (if ever issued by def't), long prior thereto, ever since, and now def't has been and is a municipal corporation, organized and existing under and by virtue of title 17 of the Revised Statutes of the State of Texas, and ever since its organization has been and now is a city of more than 1,000 and less than 5,000 inhabitants; that at the date of said ordinance and said contract and the date of said bonds and coupons the outstanding valid indebtedness of def't, exclusive of that attempted to be created by said ordinance, contract, and the issuance of said bonds and coupons, was as follows, to wit: $1,695.25, bearing interest at rate of 8% per annum, represented by city scrip issued to the Gulf, Colorado and Santa Fé Railway
15 Company to reimburse said company in money expended by it in procuring right of way within city limits by authority of ordinance of def't passed by its council Sept. 17, 1881; $5,000, bearing interest at the rate of 8% per annum, represented by city scrip issued to the Chicago, Texas and Mexican Central Railway Company by authority of ordinance of def't passed by its council Sept. 13, 1881, and $20,000, represented by forty bonds of $500 each, bearing interest from date at the rate of 8% per annum, payable semi-annually, due and payable in five — twenty years, issued by authority of ordinance of def't passed by its council June 27, 1883, providing for the erection of a city hall in and for said def't, all of which indebtedness is still outstanding and on valid and binding obligations of def't; and that such indebtedness augmented by said fifty-one bonds described in pl'ff's petition greatly exceeded 6% of the taxable values of all property, real and personal, within the limits of def't for the year 1883, to wit, in the sum of $19,185.11, for def't — that the taxable values of property, real and personal, in said city for said year only aggregated the sum of $975,169, as is shown by the official assessment rolls of said def't for said year; and that the valid indebtedness aforesaid of def't augmented by said fifty-one bonds aggregate a sum of $77,695.25, which sum def't avers exceeded 6% of the taxable values of the property, real and personal, in
16 said city (def't) for the year 1884 in the sum of $9,031.25, for def't avers that the taxable values of the property, real and personal, in said city (def't) for the year 1884 did not exceed $1,144,400, as is shown by the official assessment rolls of def't for said year; wherefore def't says that said ordinance and contract of Sept. 13, 1883, and said issues of the fifty-one bonds and coupons attached, described in pl't'ff's petition, were *ultra vires*, and that said bonds are null and void, and of this def't puts itself upon the country and prays judgment, &c.

(Signed) BLEDSOE AND FISHER,
BROWN, RAMSEY AND CRANE,
Att'ys for Def't.

And for further plea in this behalf def't, by J. M. Odell, its mayor, says that pl't'ff ought not to further have and maintain his said suit against def't, said City of Cleburne, because it says that if the said

city, by its authorized agents, ever executed and delivered the bonds and coupons referred to in pl't'ff's petition, which it here denies, it says that they were executed and delivered to the Texas Water and Gas Company, as charged in pl't'ff's petition, in payment of a certain system of water works constructed by said company in the city of Cleburne on or about the — day of ——, 1884, and that the said Texas Water and Gas Company in their said contract to build and construct said water works and as a part of said water works
17 did agree to furnish and place in the ground, along the different streets in the said city of Cleburne, four and three-fourth (4¾) miles of water mains or tubing, which said water mains or tubing said company agreed and bound themselves to construct of tubing or pipes known as the McKeesport wrought-iron (white metal) pipe, with converse patent lock joint, of sufficient thickness and strength to resist a pressure and stand a test at the factory of 300 lbs. to the square inch, and further guaranteed that said mains as aforesaid should be so constructed for strength, thickness, and durability as to resist a pressure of 200 lbs. to the square inch after they were placed in the ground along the streets of said city of Cleburne as aforesaid, and which was necessary to successfully operate said water works; but def't, by J. M. Odell, its mayor, avers and charges that, notwithstanding the agreement as aforesaid between the Texas Water and Gas Company as aforesaid and the said city of Cleburne in reference to the thickness, strength, and durability of said mains or tubing as aforesaid, said company did fraudulently and with the intent to swindle and defraud the defendant in the construction of said water works put in the ground along the streets of said city of Cleburne as a part of said water works as water mains for the full distance of 4¾ miles as aforesaid it thin, frail, weak, worthless, and rotten iron tubing, because says that after repeated occasions in the ordinary use
18 of said water works in which it became necessary to apply steam pressure to said water mains it was discovered that said water mains or iron tubing was altogether too weak to resist the amount of pressure necessary to operate said water works; and that, to wit, on or about the — day of ——, 1884, and at divers other times and occasions too numerous to mention since said date, whenever said system of water works has been use for fire purposes or for testing the capacity of same with a pressure only of 120 lbs. to the square inch, said mains or iron tubing has been unable to resist said pressure, but on every such occasion has yielded or bursted on the application of said power, springing leaks at numerous places throughout the 4¾ miles of mains in said city as aforesaid, and are now fast rotting and rusting out and becoming worthless to such an extent that def't will be required in a short time to replace the same with new piping in order to operate successfully said water works.

Def't further avers, by J. M. Odell, its mayor, that said system of water works, by reason of said defective water mains or tubing as aforesaid, is almost worthless, which defects were unknown to def't

at the time of the issuance of said bonds and coupons, if the court should find that they were legally executed and delivered by def't.

Def't as aforesaid further avers that to replace said worthless water mains with good and durable ones will cost def't the sum of $21,350.

19 Def't further avers, by J. M. Odell, mayor, that *he* is informed and believes and here charges that the pl't'ff herein had full notice of the worthlessness of said iron water mains as aforesaid at the time of his purchase of said bonds and coupons, as alleged by him, if in deed and in truth he did purchase said bonds and coupons, which def't as aforesaid here denies; wherefore def't as aforesaid avers and charges that said pl't'ff is not an innocent purchaser of said paper for value, and that the consideration for the issuance of said bonds and coupons by def't (if ever issued by it) has failed in part; and def't therefore pleads a failure of consideration for the issue and delivery of said bonds and coupons to the extent of $21,350.00, and prays judgment in accordance therewith for costs and general relief.

(Signed) J. M. ODELL,
Mayor of the City of Cleburne.

Sworn to and subscribed before me this 11th day of Jan'y, 1886.
(Signed) A. J. HOUSTON,
Clerk U. S. Cir. Court, Dallas,
By JAS. D. ADAMS, *Deputy.*

Endorsed: No. 759. W. N. Coler, Jr., *vs.* The City of Cleburne. 1st amended original answer. Filed Jan'y 11, 1885. A. J. Houston, clerk, by Jas. D. Adams, deputy.

19½ *Agreement of Att'ys.*

In U. S. Circuit Court for the Northern District of Texas, at Dallas.

W. N. COLER, Jr., *vs.* THE CITY OF CLEBURNE.

Now comes the said pl'ff and the said def't, by their attorneys, and agree as follows, to wit: That upon the trial of the above-entitled cause the first and second amended petitions of said pl'ff were before the court & considered. The said first amended petition declared on thirty-six coupons for thirty-five dollars each—amount, 1,260.00, besides interest—filed in said cause Dec. 19th, 1885; the second amended petition, filed in said cause Feb. 5, 1886, declared on 56 coupons for 35.00 each—1,960.00, besides interest; that both of said sums entered into the trial of said cause and were considered by the court; that said two amendments since the trial have been lost or mislaid, and it is agreed that this instrument shall be filed in said cause as a substitute for said amendments for the purposes of the writ of error sued out in this cause and be made a part of the

record in said cause and shall be treated in all things as fully as if the original amendments were now a part of the transcript & record.

(Signed) HERNDON AND CAIN,
Att'ys for the Pl'ff.
LEAKE & HENRY,
JAMES W. BROWN,
Att'y- for Def't.

Endorsed: No. 759. Cir. court. W. N. Coler, Jr., *vs.* The City of Cleburne. Agreement. Filed Sept. 21, 1887. A. J. Houston, clerk, by Jas. D. Adams, deputy.

20 *Third Am'd Petit'n.*

In the Circuit Court of the U. S. for the Northern District of Texas, at Dallas.

W. N. COLER, Jr., *vs.* THE CITY OF CLEBURNE.

Now comes W. N. Coler, Jr., in the above-entitled cause, leave of the court being first had, and amends his original and amended petition herein, and for amendment declares on 56 coupons made and executed and delivered by the said defendant as an additional cause of action. Plaintiff charges that in the due course of trade and for a valuable consideration paid he became the *bona fide* owner, holder, and bearer of 56 coupons, hereinafter described, before the maturity thereof; that said coupons are like those declared on in his original and amended petition; that the same were made, executed, and delivered by the city of Cleburne, State of Texas, and made payable to bearer in the city of New York, and are cut from bonds known as water-works bonds, issued by the defendant under an act of the Legislature of the State of Texas, fully described in pl't'ff's original petition; that a substantial copy of one of said coupons is as follows, to wit:

"$35.00. $35.00.

"On the first day of January, 1886, the city of Cleburne, State of Texas, will pay to bearer in the city of New York thirty-five dollars, being six months' interest due on water-works bond No. 21.

"W. N. HODGE, *Mayor.*
"W. H. GEAVES, *Secretary.*"

And stamped on the face of said coupon is figure 4; that each of said coupons is like the one described except the numbers
21 and the dates when due; that all of said coupons are for $35.00 each, representing the semi-annual interest on bonds of $1,000 each, at seven per cent.; that 7 of said coupons became due July the first, 1885, and 49 of said coupons became due January the first, 1886, making a total of $1,960.00, which said coupons bear interest at the rate of eight per cent. per annum since the maturity thereof. A descriptive list of said 56 coupons, showing the num-

bers, the dates, and amount, is attached hereto, marked Exhibit "A," and made part hereof. Plaintiff charges that said 56 coupons are past due and wholly unpaid, though payment has been often demanded, to his damage $3,000.

The premises considered, petitioner prays as in his original and amended petitions and upon final trial for judgment for his debt, interest at eight per cent. thereon, and for all costs of suit.

(Signed) HERNDON AND CAIN,
Att'ys for Pl'ff.

EXHIBIT "A."

No. of bond.	No. of coupon.	Date when due.	Amount.
14	3	July 1, 1885	35
45	3	"	35
46	3	"	35
47	3	"	35
48	3	"	35
49	3	"	35
51	3	"	35
22		Total--7 coupons, #3—$245.00.	
1	4	January 1, 1886	35
2	4	"	35
3	4	"	35
4	4	"	35
5	4	"	35
6	4	"	35
7	4	"	35
8	4	"	35
9	4	"	35
10	4	"	35
11	4	"	35
12	4	"	35
13	4	"	35
14	4	"	35
16	4	"	35
17	4	"	35
18	4	"	35
19	4	"	35
20	4	"	35
21	4	"	35
22	4	"	35
23	4	"	35
			770

No. of bond.	No. of coupon.	Date when due.	Amount.
24	4	January 1, 1886	35
25	4	"	35
26	4	"	35
27	4	"	35
28	4	"	35
29	4	"	35
30	4	"	35
31	4	January 1, 1886	35
32	4	"	35
33	4	"	35
34	4	"	35
35	4	"	35
36	4	"	35
37	4	"	35
38	4	"	35
39	4	"	35
40	4	"	35
41	4	"	35
42	4	"	35
43	4	"	35
44	4	"	35
45	4	"	35
46	4	"	35
47	4	"	35
48	4	"	35
49	4	"	35
51	4	"	35
			1,715
		7 coupons, #3, due July 1, 1885	245
		49 coupons, #4, due Jan'y 1, 1886	1,715
		Graud total	1,960

Endorsed: No. 759. W. N. Coler, Jr., *vs.* The City of Cleburne. Pl'ff's third amended petition. Filed Feb'y 5, 1886. A. J. Houston, clerk, by Jas D. Adams, deputy.

23 *Order to Amend Answer.*

W. N. COLER, Jr., *vs.* THE CITY OF CLEBURNE. } 759.

MONDAY, *February* 15, 1886.

This day, upon application of defendant, it is hereby granted leave to amend in this cause.

2nd Am'd Answer.

In the Circuit Court of the United States for the Northern District of Texas, at Dallas. January Term, 1886.

W. N. COLER, Jr., *vs.* THE CITY OF CLEBURNE. } No. 759.

And now comes def't in above-entitled cause, by its att'ys, and, by leave of the court first had and obtained, files this its 2d amended original answer, amending its original answer, filed herein ——, —, 1885, and its 1st amended original answer, filed herein January ——, 1886, and for amendment thereto demurs to pl't'ff's petition, and says that said petition is wholly insufficient in law to require def't to answer thereto.

Wherefore def't prays judgment of the court, &c.

(Signed) BLEDSOE & FISHER,
BROWN, RAMSEY & CRANE,
Att'ys for Def't.

And for plea in this behalf def't, by its att'ys, denies all and singular the allegations in pl't'ff's petition, and of this def't puts itself upon the country; wherefore def't prays judgment, &c.

(Signed) BLEDSOE & FISHER,
BROWN, RAMSEY AND CRANE,
Att'ys for Def't.

24 And for further plea in this behalf def't, by J. M. Odell, its duly elected and qualified mayor, says that on the first Tuesday in April, 1884, said J. M. Odell, at a regular election held in and for said City of Cleburne, def't, on said day, was duly elected to the office of mayor thereof for a term of two years, and immediately thereafter qualified as required by law, and has continuously acted as such mayor and performed the duties of such office from that time to the present day; and def't, by its said mayor, says that the coupons and bonds mentioned in pl'ff's petition and said entire series of fifty-one bonds and all coupons thereto, of which those mentioned in pl't'ff's petition pl'ff claims to be a part, are not the obligations, bonds, and coupons of def't, and were never executed

and delivered by def't, because def't, by its said mayor, avers that the pretended bonds and coupons mentioned in pl'ff's petition never had any existence prior to the 3d day of July, 1884; that they were never signed by the said J. M. Odell, the then legally qualified and acting mayor of def't, or by his authority or by any person authorized by law to act as mayor of def't, and that said J. M. Odell, mayor as aforesaid, at all times refused to sign the same; that, although said pretended bonds and coupons on their face purport to have been executed on January 1, 1884, and to be signed by the mayor of def't, in truth and in fact they were made on the 3d day of July, 1884, antedated and signed by one W. N. Hodge, a
25 private citizen, but formerly mayor of def't, and whose term of office as such mayor had long prior to said July 3d, 1884, expired, to wit, on the — day of April, 1884; that if said pretended bonds and coupons have ever been registered in the office of the comptroller of public accounts of the State of Texas such registration was illegal and without any authority, because def't says that the same were never forwarded by its said mayor, J. M. Odell, to said comptroller, nor by any person authorized by him so to do, and that its said mayor never forwarded to said comptroller his certificate showing the values of taxable property, real and personal, in said city for the year 1884, and never authorized any person so to do, and that said pretended bonds and coupons were never delivered by said mayor or by his authority or by any person authorized to act as mayor of def't to the Texas Water and Gas Company or to any other person or persons.

Wherefore def't says that the instruments declared on in pl't'ff's petition are not the obligations of this def't, and of this puts itself upon the country and prays judgment, &c.

(Signed) J. M. ODELL.

Subscribed and sworn to before me this 15th day of Febr'y, 1886.

(Signed) A. J. HOUSTON,
Clerk U. S. Cir. Court, Dallas,
By JAS. D. ADAMS, *Deputy.*

26 And def't, by its att'ys, for further plea in this behalf, says that pl't'ff ought not to further have and maintain his said suit, because it avers that if said fifty-one bonds and coupons attached thereto, described in pl't'ff's petition, and of which pl't'ff claims those sued on to be a part, were ever issued and delivered by def't to the Texas Water and Gas Co., as alleged by pl't'ff (which it specially denies), the same were executed, issued, and delivered in compliance with an ordinance enacted by the council of def't on the 13th day of Sept., 1883, and in fulfillment of a contract made by virtue of said ordinance between the def't and the said Texas Water and Gas Co. on said day, by which ordinance it was ordered and by which contract it was agreed to issue to said Texas Water and Gas Co., upon the completion of a certain system of water works to be constructed by said company for def't in accordance with said contract, and to be completed on or before June 1, 1884, fifty-one bonds of

$1,000, bearing interest from date at the rate of 7% per annum, payable semi-annually, due and payable twenty years after date, which ordinance and contract def't avers were and are null and void, and especially so so far as same orders and contracts for the execution, issuance, and delivery of such bonds, and that such bonds, if ever issued by def't's officers, are in existence without authority of law and are null and void, for def't avers that at the dates of said ordinance and said contract, and at the time of the issuance
27 of such bonds, prior thereto and ever since, def't has been and now is a municipal corporation, organized under and by virtue of title XVII of the Revised Civil Statutes of the State of Texas, and at its organization was, ever since has been, and now is a city exceeding 1,000 inhabitants and not exceeding 5,000 inhabitants; that at the dates of said ordinance, said contract, and said bonds and coupons the outstanding valid indebtedness of def't, exclusive of that attempted to be created by the issue of said fifty-one bonds, was as follows, to wit: Sixteen hundred and ninety-five and $\frac{25}{100}$ dollars, bearing interest at the rate of 8% per annum, represented by city scrip issued to the G., C. and S. F. R'y Co., to reimburse said company for money expended by it in procuring right of way in city limits, by authority of ordinance of def't passed Sept. 11, 1881; five thousand dollars, bearing interest at the rate of 8% per annum, represented by city scrip issued to C., T. and M. C. R'y Co., by authority of ordinance of def't passed Sept. 13, 1881; and twenty thousand dollars represented by forty bonds of five hundred dollars each, bearing interest from date at the rate of 8% per annum, payable semi-annually, due and payable in five — twenty y'rs, commonly known as five-twenty bonds, issued by authority of ordinance of def't, passed June 27, 1883, providing for the erection of a city hall, all of which indebtedness is now outstanding, and on valid and binding obligations of def't, and that such indebtedness, augmented by said fifty-one
28 bonds described in pl't'ff's petition, greatly exceeded 6% of the values of all taxable property, real and personal, within the limits of def't for the year 1883, to wit, in the sum of nineteen thousand one hundred and eighty-five and $\frac{11}{100}$ dollars; for def't avers that the values of all taxable property, real and personal, in said city for said year aggregated only the sum of nine hundred and seventy-five thousand one hundred and sixty-nine dollars, as is shown by the official assessment rolls of def't for said year, and that said indebtedness, augmented by said fifty-one bonds, aggregate a sum of seventy-seven thousand six hundred and ninety-five and $\frac{25}{100}$ dollars, which sum def't avers exceeded 6% of the values of all taxable property, real and personal, in said city on July 3d, 1884, in the sum of nine thousand and thirty-one and $\frac{25}{100}$ dollars; for def't says that the values of all property, real and personal, taxable within said city for the year 1884 aggregated only the sum of one million one hundred and forty-four thousand four hundred dollars, as is shown by the official assessment rolls of def't for said year; wherefore def't says that said ordinance and said contract of Sept. 13, 1883, and the issue of said fifty-one bonds were *ultra vires*, and that

and delivered by def't, because def't, by its said mayor, avers that the pretended bonds and coupons mentioned in pl'ff's petition never had any existence prior to the 3d day of July, 1884; that they were never signed by the said J. M. Odell, the then legally qualified and acting mayor of def't, or by his authority or by any person authorized by law to act as mayor of def't, and that said J. M. Odell, mayor as aforesaid, at all times refused to sign the same; that, although said pretended bonds and coupons on their face purport to have been executed on January 1, 1884, and to be signed by the mayor of def't, in truth and in fact they were made on the 3d day of July, 1884, antedated and signed by one W. N. Hodge, a
25 private citizen, but formerly mayor of def't, and whose term of office as such mayor had long prior to said July 3d, 1884, expired, to wit, on the — day of April, 1884; that if said pretended bonds and coupons have ever been registered in the office of the comptroller of public accounts of the State of Texas such registration was illegal and without any authority, because def't says that the same were never forwarded by its said mayor, J. M. Odell, to said comptroller, nor by any person authorized by him so to do, and that its said mayor never forwarded to said comptroller his certificate showing the values of taxable property, real and personal, in said city for the year 1884, and never authorized any person so to do, and that said pretended bonds and coupons were never delivered by said mayor or by his authority or by any person authorized to act as mayor of def't to the Texas Water and Gas Company or to any other person or persons.

Wherefore def't says that the instruments declared on in pl't'ff's petition are not the obligations of this def't, and of this puts itself upon the country and prays judgment, &c.

(Signed) J. M. ODELL.

Subscribed and sworn to before me this 15th day of Febr'y, 1886.

(Signed) A. J. HOUSTON,
Clerk U. S. Cir. Court, Dallas,
By JAS. D. ADAMS, *Deputy.*

26 And def't, by its att'ys, for further plea in this behalf, says that pl't'ff ought not to further have and maintain his said suit, because it avers that if said fifty-one bonds and coupons attached thereto, described in pl't'ff's petition, and of which pl't'ff claims those sued on to be a part, were ever issued and delivered by def't to the Texas Water and Gas Co., as alleged by pl't'ff (which it specially denies), the same were executed, issued, and delivered in compliance with an ordinance enacted by the council of def't on the 13th day of Sept., 1883, and in fulfillment of a contract made by virtue of said ordinance between the def't and the said Texas Water and Gas Co. on said day, by which ordinance it was ordered and by which contract it was agreed to issue to said Texas Water and Gas Co., upon the completion of a certain system of water works to be constructed by said company for def't in accordance with said contract, and to be completed on or before June 1, 1884, fifty-one bonds of

$1,000, bearing interest from date at the rate of 7% per annum, payable semi-annually, due and payable twenty years after date, which ordinance and contract def't avers were and are null and void, and especially so so far as same orders and contracts for the execution, issuance, and delivery of such bonds, and that such bonds, if ever issued by def't's officers, are in existence without authority of law and are null and void, for def't avers that at the dates of said ordinance and said contract, and at the time of the issuance
27 of such bonds, prior thereto and ever since, def't has been and now is a municipal corporation, organized under and by virtue of title XVII of the Revised Civil Statutes of the State of Texas, and at its organization was, ever since has been, and now is a city exceeding 1,000 inhabitants and not exceeding 5,000 inhabitants; that at the dates of said ordinance, said contract, and said bonds and coupons the outstanding valid indebtedness of def't, exclusive of that attempted to be created by the issue of said fifty-one bonds, was as follows, to wit: Sixteen hundred and ninety-five and $\frac{25}{100}$ dollars, bearing interest at the rate of 8% per annum, represented by city scrip issued to the G., C. and S. F. R'y Co., to reimburse said company for money expended by it in procuring right of way in city limits, by authority of ordinance of def't passed Sept. 11, 1881; five thousand dollars, bearing interest at the rate of 8% per annum, represented by city scrip issued to C., T. and M. C. R'y Co., by authority of ordinance of def't passed Sept. 13, 1881; and twenty thousand dollars represented by forty bonds of five hundred dollars each, bearing interest from date at the rate of 8% per annum, payable semi-annually, due and payable in five — twenty y'rs, commonly known as five-twenty bonds, issued by authority of ordinance of def't, passed June 27, 1883, providing for the erection of a city hall, all of which indebtedness is now outstanding, and on valid and binding obligations of def't, and that such indebtedness, augmented by said fifty-one
28 bonds described in pl't'ff's petition, greatly exceeded 6% of the values of all taxable property, real and personal, within the limits of def't for the year 1883, to wit, in the sum of nineteen thousand one hundred and eighty-five and $\frac{11}{100}$ dollars; for def't avers that the values of all taxable property, real and personal, in said city for said year aggregated only the sum of nine hundred and seventy-five thousand one hundred and sixty-nine dollars, as is shown by the official assessment rolls of def't for said year, and that said indebtedness, augmented by said fifty-one bonds, aggregate a sum of seventy-seven thousand six hundred and ninety-five and $\frac{25}{100}$ dollars, which sum def't avers exceeded 6% of the values of all taxable property, real and personal, in said city on July 3d, 1884, in the sum of nine thousand and thirty-one and $\frac{25}{100}$ dollars; for def't says that the values of all property, real and personal, taxable within said city for the year 1884 aggregated only the sum of one million one hundred and forty-four thousand four hundred dollars, as is shown by the official assessment rolls of def't for said year; wherefore def't says that said ordinance and said contract of Sept. 13, 1883, and the issue of said fifty-one bonds were *ultra vires*, and that

said bonds are null and void; and of this def't puts itself upon the country and prays judgment, &c.

(Signed) BLEDSOE AND FISHER,
BROWN, RAMSEY AND CRANE,
Att'ys for Def't.

29 And for further plea in this behalf def't, by J. M. Odell its legally qualified and acting mayor, says that pl't'ff ought not to further have and maintain his said suit against def't, said City of Cleburne, because it says that if the said city, by authorized officers and agents, ever executed and delivered the bonds and coupons referred to in pl't'ff's petition, which it here specially denies, it says that they were executed and delivered to the Texas Water and Gas Company, as charged in pl't'ff's petition, in payment of a system of water works constructed by said company in the city of Cleburne on or about the — day of ——, 1884, and that the said Texas Water and Gas Company, in their said contract to build and construct said water works, and as a part of said water works, did agree to furnish and place in the ground along the different streets in the city of Cleburne four and ¾ miles of water mains or tubing. Said company agreed and bound themselves to construct of piping or tubing known as the McKeesport wrought iron (white metal) pipe, with converse patent lock joint, of sufficient thickness and strength to resist a pressure at the factory of 300 lbs. to the square inch, and further guaranteed that said mains as aforesaid should be so constructed for strength, thickness, and durability as to resist a pressure of 200 lbs. to the square inch after they were placed in the ground along the streets of the city of Cleburne as aforesaid, and which was necessary and required to
30 successfully operate said water works; but def't, by J. M. Odell, mayor, avers and charges that, notwithstanding the agreement as aforesaid between the Texas Water and Gas Company as aforesaid and the city of Cleburne in reference to the thickness, strength, and durability of said water mains as aforesaid, said company did, fraudulently and with intent to swindle and defraud the def't in the construction of said water works, put in the ground in the city of Cleburne and along and in her streets, as water mains, for the full distance of four and ¾ miles as aforesaid, thin, frail, weak, worthless, and rotten iron tubing, because it says that upon repeated occasions, in the ordinary use of said water works, in which it became necessary to apply steam pressure to said water mains, it was discovered that said water mains or iron tubing was altogether too weak to resist the amount of pressure necessary to operate said water works, and that, to wit, on or about the — day of ——, 1884, and at divers other times and occasions, too numerous to mention, since that date, and on every occasion since said date whenever said system of water works has been used for fire purposes or for testing capacity of same with a pressure of only 120 lbs. to the square inch, said mains or iron tubing has been unable to resist said pressure, and on every said occasion has yielded or bursted in the application of said power, spring-
31 ing leaks at numerous places throughout the four and ¾ miles

of piping in said city as aforesaid, and are now fast rotting and becoming worthless, to such an extent that def't will be required in a short time to replace the same with new piping in order to successfully operate said water works. Def't further avers, by J. M. Odell, mayor, that said system of water works, by reason of said defective water mains or tubing as aforesaid, is almost worthless, which defects were unknown to def't at the time of the issuance of said bonds, if the court should find that they were legally executed and delivered by def't. Def't, as aforesaid, further avers that to replace said worthless water mains with good and durable ones will cost def't the sum of twenty-one thousand three hundred and fifty dollars. Def't further avers, by J. M. Odell, mayor, that pl't'ff herein (as he is informed and believes) had full notice of the worthlessness of said water mains as aforesaid at the time of his purchase of said coupons as alleged by him, if in deed and truth he did purchase same, which def't here denies. Wherefore def't as aforesaid avers and charges that said pl'ff is not an innocent purchaser and holder of said coupons for value, and that the consideration for the issuance of said bonds and coupons, if ever issued by def't as aforesaid, has failed in part, and def't therefore pleads a failure of
32 consideration for the issue and delivery of said bonds and coupons to the extent of $21,350, and prays judgment in accordance therewith, and for costs and general relief.

(Signed) BLEDSOE AND FISHER,
BROWN, RAMSEY AND CRANE,
Att'ys for Def't.

J. M. Odell, being duly sworn, says that he is the duly qualified and acting mayor of the defendant, The City of Cleburne, and that the facts and statements set forth and contained in the above and foregoing special answer are true.

(Signed) J. M. ODELL.

Subscribed and sworn to before me this 15th day of Feb'ry, 1886.
A. J. HOUSTON,
Clerk U. S. Cir. Court, Dallas,
By JAS. D. ADAMS, *Deputy.*

Endorsed: No. 759. W. N. Coler, Jr., *vs.* The City of Cleburne. 2d amended answer. Filed Feb'ry 15, 1886. A. J. Houston, clerk, by Jas. D. Adams, deputy.

Agreement of Att'ys.

In U. S. Court at Dallas.

W. N. COLER, Jr., *vs.* CITY OF CLEBURNE.

It is agreed by and between the att'ys of the parties in the
33 above-entitled cause that said cause shall be set for trial on

Wednesday, 9th day of June, 1886, and that we hereby waive a jury in said cause.

(Signed) HERNDON, CAIN AND GARRISON,
Att'ys for Pl'ffs.
BLEDSOE AND FISHER,
BROWN, RAMSEY AND CRANE,
Att'ys for Def't.

Endorsed: No. 759. W. N. Coler, Jr., *vs.* City of Cleburne. Agreement. Filed June 2, 1886. A. J. Houston, clerk, by Jas. D. Adams, deputy.

Order for Continuance.

W. N. COLER, Jr., *vs.* THE CITY OF CLEBURNE. } 759.

WEDNESDAY, *June* 9, 1886.

This day this cause was called for trial, and then came on to be heard the defendant's application for a continuance, and the affidavit of defendant being read in support thereof, it is considered by the court that this cause be, and the same is hereby, continued until the next regular term of this court.

Pl'ff's Demurrer to Plea.

In U. S. C. Court for N. D. of Texas, at Dallas.

W. N. COLER, Jr., *vs.* CITY OF CLEBURNE. } 759.

And now comes said pl'ff, by att'y, and excepts to def't's plea of *non est factum*, because the same is insufficient in law, and prays judgment thereof

34 (Signed) HERNDON, CAIN AND GARRISON AND LABOTT AND NOBLE, *Att'ys for Pl'ff.*

Endorsed: 759. W. N. Coler, Jr., *vs.* City of Cleburne. Demurrer to def't's plea of *non est factum*. Filed June 9, 1886. A. J. Houston, clerk.

Fourth Ame'd Petition.

In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

W. N. COLER, Jr., *vs.* THE CITY OF CLEBURNE.

To the honorable the judges of said court:

W. N. Coler, Jr., who is a resident and citizen of the city, county, and State of New York, files this his supplemental petition in the above-entitled cause, now pending in said court, against The City of Cleburne, defendant herein.

Plaintiff alleges that said defendant, The City of Cleburne, is a corporation created under the laws of the State of Texas, with a mayor and board of aldermen, capable of suing and defending, and that said defendant is a resident and citizen of said northern district of Texas.

Plaintiff charges that heretofore, to wit, in the due course of trade and before the maturity thereof, for a valuable consideration, he became the owner, holder, and bearer *bona fide*, and without notice of any defense thereto, of fifty coupons or obligations in writing
35 for thirty-five dollars each, forty-eight of which became due and payable in the city of New York July the first, 1886; one of said coupons became due July the first, 1885, and one became due January the first, 1886, in the city of New York as aforesaid. A substantial copy of one of said coupons is as follows, to wit:

"$35.00. $35.00.

"On the first day of July, 1886, the City of Cleburne, State of Texas, will pay to bearer, in the city of New York, thirty-five dollars, being six months' interest due on water-works bond No. 25.

"W. N. HODGE, *Mayor.*
"W. H. GRAVES, *Secretary.*"

Stamped on the face of said coupon is the number of the coupon itself. The above-described coupon has the number 5 thereon.

All of said coupons are like the one described, except differing in the numbers and date when due. A descriptive list of said fifty coupons, showing the number of the bond from which each was cut, the number of the coupon, the amount, and the date when due, is attached hereto, marked "Exhibit A," and made a part hereof.

Plaintiff charges that said obligations are payable to bearer; that he bought the same before maturity for a valuable consideration; that he is a *bona fide* owner, holder, and bearer thereof without notice of any defects therein; that the same are past due and wholly unpaid, though demand has been made, to his damage two thousand dollars.

36 Plaintiff charges that said defendant made, executed, and delivered its certain water-works bonds for one thousand dollars each, payable to bearer, numbered from 1 consecutively up to 51, inclusive, and put into circulation the same for value before the maturity thereof, and that the said coupons described as aforesaid were cut off of said bonds and purchased by plaintiff in due course of trade.

The premises considered, plaintiff prays for process against said defendant, for judgment, for his principal debt, $1,750.00, interest at 8 per cent. per annum on each of said coupons since the maturity thereof, for all costs of suit, and for general relief.

(Signed) HERNDON, CAIN & GARRISON,
Attorneys for Plaintiff.

EXHIBIT "A."

No. bond.	No. coup.	Date when due.	Amount.	No. bond.	No. coup.	Date when due.	Amount.
1	5	July 1st, 1886	35	19	5	July 1st, 1886	35
22	5	"	35	37			
23	5	"	35				
24	5	"	35	20	5	July 1st, 1886	35
25	5	"	35	21	5	"	35
26	5	"	35	2	5	"	35
27	5	"	35	3	5	"	35
28	5	"	35	4	5	"	35
29	5		35	5	5	"	35
30	5		35	6	5	"	35
31	5		35	7	5	"	35
32	5		35	8	5	"	35
33	5		35	9	5	"	35
36	5		35	10	5	"	35
37	5	July 1st, 1886	35	11	5	"	35
38	5	"	35	12	5	"	35
39	5	"	35	13	5	"	35
40	5	"	35	50	3	" 1885	35
41	5	"	35	50	4	January 1st, 1886	35
42	5	"	35	45	5	July 1st, 1886	35
43	5	"	35	46	5	"	35
44	5	"	35	47	5	"	35
34	5	"	35	48	5	"	35
35	5	"	35	49	5	"	35
16	5	"	35	50	5	"	35
17	5	"	35				
18	5	"	35			Total	$1,750

Endorsed: No. 759. W. N. Coler, Jr., *vs.* The City of Cleburne. Filed Dec. 20, 1886. A. J. Houston, clerk.

Fifth Sup'l Petition.

In the Circuit Court of the United States in and for the Northern District of Texas, at Dallas.

W. N. COLER, JR., *vs.* THE CITY OF CLEBURNE.

To the honorable the judges of said court;

W. N. Coler, Jr., who is a resident and citizen of the city, county, and State of New York, files this his fifth supplemental petition in the above-entitled cause, now pending in said court, against The City of Cleburne, defendent herein.

38

Plaintiff alleges that said defendant, The City of Cleburne, is a corporation created under the laws of the State of Texas, with a mayor and board of aldermen, capable of suing and defending, and that said defendant is a resident and citizen of said northern district of Texas. Plaintiff charges that heretofore, to wit, in the due

course of trade and before the maturity thereof, for a valuable consideration, he became the *bona fide* owner, holder, and bearer, and without notice of any defense thereto, of forty-eight coupons or obligations in writing, for thirty-five dollars each, all of which became due and payable in the city of New York on the first day of January, 1887.

A substantial copy of one of said coupons is as follows, to wit:

"$35.00. $35.00.

"On the first day of January, 1887, the City of Cleburne, State of Texas, will pay to bearer, in the city of New York, thirty-five dollars, being six months' interest due on water-works bond No. 25.

"W. N. HODGE, *Mayor.*
"W. H. GRAVES, *Secretary.*"

Stamped on the face of each of said coupons is the number of the coupon itself. The above-described coupon has the number 6 thereon.

All of said coupons are like the one described, except differing in the numbers and date when due. A descriptive list of said forty-eight coupons, showing the number of the bond from which each
39 was cut, the number of the coupon, and the am't & the date when due, is attached hereto, marked Exhibit "B," and made a part hereof.

Plaintiff charges that said obligations are payable to bearer; that he bought the same before maturity for a valuable consideration; that he is a *bona fide* owner, holder, and bearer thereof without notice of any defects therein; that the same are past due and wholly unpaid, though demand has been made for the payment of the same, to his damage two thousand dollars.

Plaintiff charges that said defendant made, executed, and delivered its certain water-works bonds for one thousand dollars each, payable to bearer, numbered from 1 consecutively to 51, inclusive, and put the same into circulation for value before the maturity thereof, and that the said coupons described as aforesaid were cut off of said bonds and purchased by plaintiff in the due course of trade.

The premises considered, the plaintiff prays for process against said defendant, for judgment for his principal debt, $1,680.00, interest at 8 per cent per annum on each of said coupons, since the maturity thereof, for all costs of suit, and for general relief.

(Signed) HERNDON, CAIN AND GARRISON,
Attorneys for Plaintiff.

40 EXHIBIT "B."

No. bond.	No. coupon.	Date due.	Amount.	No. bond.	No. coupon.	Date due.	Amount.
1	6	Jan'y 1st, 1887	35	17	6	Jan'y 1st, 1887	35
22	6	"	35	18	6	"	35
23	6	"	35	19	6	"	35
24	6	"	35	20	6	"	35
25	6	"	35	21	6	"	35
26	6	"	35	2	6	"	35
27	6	"	35	3	6	"	35
28	6	"	35	4	6	"	35
29	6	"	35	5	6	"	35
30	6	"	35	6	6	"	35
31	6	"	35	7	6	"	35
32	6	"	35	8	6	"	35
33	6	"	35	9	6	"	35
34	6	"	35	10	6	"	35
35	6	"	35	11	6	"	35
36	6	"	35	12	6	"	35
37	6	"	35	13	6	"	35
38	6	"	35	45	6	"	35
39	6	"	35	46	6	"	35
40	6	"	35	47	6	"	35
41	6	"	35	48	6	"	35
42	6	"	35	49	6	"	35
43	6	"	35	50	6	"	35
44	6	"	35				
16	6	"	35			Total	$1,680

41 Endorsed: No. 759. W. N. Coler, Jr., *vs.* The City of Cleburne. Plaintiff's fifth supplemental petition. Filed Jan'y 2, 1887. A. J. Houston, clerk.

Water Works Contract.

This contract, made and entered into this 13 day of September, A. D. 1883, by and between The City of Cleburne, a municipal corporation of the county of Johnson, State of Texas, hereinafter styled party of the first part, and The Texas Water and Gas Co., a corporation of the city of Tyler, county of Smith, State of Texas, and hereinafter styled party of the second part, witnesseth: That whereas the city of Cleburne, through and by the city council of the said city of Cleburne, deem it necessary to provide for an efficient protection of the property of the tax-payers of the city of Cleburne from fire, and also to secure to the citizens of the said city a supply of water for domestic purposes, &c.:

Therefore, the party of the first part, by her mayor, W. N. Hodge, duly attested by W. H. Graves, secretary of said city of Cleburne, in accordance with an ordinance of the city council approved on the 13 day of September, A. D. 1883, do agree, promise, and obligate to

deliver to the party of the second part fifty-one bonds, of one thousand dollars each, due and payable twenty years after date,
42 with interest at seven per cent. per annum, payable semi-annually, the said interest to be secured by forty coupons attached to said bonds for thirty-five dollars each, due on the first day of July, 1884, and January, 1885, after the signing — this contract, and on each subsequent first day of July and January up — and including the first day of July, 1905, and to be delivered at the time and upon the condition hereinafter specified and upon terms as hereinafter stated; and the party of the second part doth agree and obligate itself to build and construct, furnishing all material therefor, a complete system of water works, according to plans and specifications herewith filed and made a part of this contract, within the city of Cleburne, and that the same shall be completed and submitted to a test hereinafter specified by or before the first day of June, A. D. 1884; and the party of the second part doth further agree that when said works are completed that they shall be submitted to a thorough test of two hundred pounds pressure to the square inch, and that the said system shall be capable of throwing four fire streams at one time from any four hydrants through fifty feet of 2½-inch rubber hose (or any pipes not smaller than six inches) with one-inch nozzle to height of eighty feet.

And the party of the first part doth obligate and bind itself to receive and accept said works upon their completion and the testing thereof as aforesaid; and the party of the first part hereby agree that it will deliver to the party of the second part the bonds
43 mentioned in the first part of this contract, upon the party of the second part completing works as per plans and specifications — for; and it is further agreed that if the said bonds are not sooner delivered, as herein provided, that then the said bonds shall be delivered upon the completion and acceptance of the system of water works herein contracted to be built; and it is further understood that the test herein provided for shall be made in the presence of a committee of the aldermen of the city of Cleburne, and upon a favorable report of the said committee the said party of the second part shall be discharged from further obligations in the premises.

It is further agreed between the party of the first and the party of the second part that the city shall have the option to redeem said bond- at the expiration of ten years or any time thereafter after giving due notice.

W. N. HODGE,
Mayor of the City of Cleburne.
M. T. BROWN,
Vice-President, General Manager of the Texas Water and Gas Co.

Attest: W. H. GRAVES,
City Secretary.

Endorsed: Filed Febr'y 21, 1887. A. J. Houston, clerk.

44 *Transcript from Comptroller's Office.*

Register of Cleburne city hall bonds.

CLEBURNE, TEXAS, *Sept.* 3, 1883.

This is to certify that the following is a correct statement of the assessed value of real estate and personal property assessed by me in the city of Cleburne for the year 1883:

Real estate	$549,725
Personal property	425,444
Total	$975,169

[SEAL.] (Signed) J. L. GILLAM,
Ass'r & Coll'r.

An ordinance to provide for issuing bonds to build a city hall and levying a tax to pay interest, &c.

Whereas the city council of the city of Cleburne, on the 14th day of June, 1883, ordered the erection of a city hall for the use of said city of Cleburne: Therefore—

SEC. 1. Be it ordained by the city council of the city of Cleburne that the city council hereby authorizes the issuing of bonds for the building of the city hall referred to in the foregoing preamble to the amount of twenty thousand dollars ($20,000), in denominations of five hundred dollars each, due and payable in twenty (20) years from their date and redeemable at the pleasure of said city of Cleburne at any time after the expiration of five years, and bearing eight per cent. interest per annum from date until paid; said bonds and interest to be payable in the city of New York.

45 SEC. 2. Be it further ordained that whereas the said city council of the city of Cleburne did, by resolution adopted on the 14th day of June, 1883, authorize the issuance of bonds to the amount of twenty thousand dollars, in sums of five hundred dollars each, for the purpose of building a city hall in and for said city of Cleburne; and whereas it now becomes the duty of said city council of the city of Cleburne to provide for the payment of interest on said bonds and to create a sinking fund to pay the said bonds at maturity: Therefore—

SEC. 3. Be it ordained that an ad valorem tax of one-fourth of one per cent. be, and is hereby, levied on all the property, both real and personal, in the corporate limits of the city of Cleburne on the first day of January, 1883, and that the assessor and collector proceed to collect the same at once.

SEC. 4. This ordinance to be in force and effect from and after its passage.

Passed and approved June 27th, 1883.
(Signed) W. N. HODGE, *Mayor.*

Attest: W. H. GRAVES, *Secretary.*

An ordinance to provide for the construction of water works in the city of Cleburne, to provide for issuing bonds, and to levy a tax to pay interest and create a sinking fund.

Whereas the city council of the city of Cleburne deem it
46 absolutely necessary that some steps should be taken by the city of Cleburne to protect the property of the city and citizens against fire; and whereas it is further manifest that the establishment of an efficient system of water works is the most economical protection against fires; and whereas the Texas Water and Gas Company, a corporation having its chief domicile in the city of Tyler, Smith county, Texas, has made a proposition, with plans and specifications, to construct a complete system of water works in the city of Cleburne and for the city of Cleburne (as per plans and specifications now on file in the office of the city secretary) for fifty-one bonds of the city of Cleburne for one thousand dollars each, with interest at seven per cent. per annum, with coupons attached for interest, payable semi-annually; and whereas the city council of the city of Cleburne has accepted said proposition of the said Texas Water and Gas Company; Now, therefore—

Be it ordained by the city council of the city of Cleburne that the mayor and city secretary are hereby authorized and fully empowered to execute, sign, and deliver, for and in behalf of the city of Cleburne, a contract with the Texas Water and Gas Company, a corporation under the laws of Texas, for the construction of a complete system of water works within the corporate limits of the city of Cleburne according to the plans and specifications sub-
47 mitted by the Texas Water and Gas Company, through M. T. Brown, vice-president and general manager of said corporation; and it is further ordered that the mayor is forthwith required to have lithographed fifty-one bonds for one thousand dollars each, due twenty years after date, and redeemable at the option of the city at any time after ten years, with forty coupons attached to each for thirty-five dollars, each payable in the city of New York or in the city of Austin, Texas, the said coupons to fall due on the first day of July, 1884, and the first day of January, 1885, and on each subsequent first day of July and first day of January for each and every year up to and including the first day of July, 1905, and after said bonds are lithographed the same to be executed, signed, and delivered to the said Texas Water and Gas Company upon the said company's complying with their contract as therein provided; and it is further ordained by the city council aforesaid that all the revenues realized from operation of water works aforesaid over and above the expenditures in operating the same be, and the same is hereby, appropriated and constitute a fund to pay the interest and

create a sinking fund for the final redemption of said bonds, as afore provided; and it is further ordained by the city council aforesaid that the following tax shall be annually levied and collected, and the same is hereby appropriated to pay the interest on
48 water-works bonds hereinbefore authorized to be issued: One-fourth of one per cent. on each one hundred dollars' worth of property, and that this provision shall remain and be in force until the said water-works bonds are fully paid and satisfied, provided nothing herein shall prevent the city from remitting the tax or any part thereof herein provided for in the event the net revenues shall realize a fund sufficient to pay interest and create ten per cent. sinking fund on said water-works bonds; and it is further ordained that this ordinance take effect from and after its passage.

And it is further ordained by the city council aforesaid that to the above there shall be levied and collected one-tenth of one per cent. under and by virtue of the power of the city to levy and collect an annual tax to defray the current expenses of its local government, and the same is hereby set apart and appropriated to payment of the interest and the sinking fund of the bonds herein provided for: Provided, That this section of this ordinance shall be inoperative for such year or years as it may be found that the tax and revenue heretofore provided for and set apart shall be sufficient to pay the interest and sinking funds as provided.

Passed September 13, 1883. Approved September 13, 1883.

W. N. HODGE, *Mayor.*

Attest: W. H. GRAVES, *Sec'y.*

49 THE STATE OF TEXAS, *County of Johnson:*

The undersigned mayor and secretary of the city of Cleburne, county and State aforesaid, do hereby certify that the above is a true and correct copy of "An ordinance to provide for the construction of water works in the city of Cleburne," etc., and that it was legally passed and published according to law.

W. M. HODGE, *Mayor.*
W. H. GRAVES, *Secretary.*

In testimony whereof I hereunto affix my signature and the seal of said city this 4th day of Feb'y, A. D. 1884.

W. H. GRAVES,
City Secretary,

We, the undersigned citizens and business men of the city of Cleburne, have no hesitancy in expressing the opinion that the actual value of the property, real and personal, of the city of Cle-

burne is fully two million dollars, and we earnestly request the comptroller of the State to register the Cleburne city water bonds.

W. N. HODGE, *Ex-Mayor.*
H. H. NILES.
TILMAN FOWLER.
G. G. TOWLES.
VOLNEY ROBINSON.
J. H. HOUSE, *Real Est. Ag't.*
J. N. ENGLISH.
J. D. BRYAN.
THOS. LAWRENCE.
JESSE J. BAKER.
SOL. LOCKETT.
W. F. RAMSEY.
D. J. BROWN.
E. M. HEATH.
S. B. ALLEN.
L. M. GUGGENHEIM.
JAMES GRAHAM.
W. J. RUTLEDGE.
W. H. DEAL.

50 STATE OF TEXAS, *City of Cleburne:*

I, W. H. Graves, secretary of the city of Cleburne, do hereby certify that the parties signing the above paper, addressed to the comptroller of the State, are personally known to me as reputable citizens and business men of the said city, and their judgment in the premises is reliable, some of them being large real estate owners.

In witness whereof I hereunto affix my official signature, with the seal of office, at Cleburne, this 10th day of July, A. D. 1884.

[SEAL.] W. H. GRAVES,
Sec'y City of Cleburne.

COMPTROLLER'S OFFICE, AUSTIN, *May* 16, 1885.

I, Wm. J. Swain, hereby certify that the within is a correct transcript of the records of this office.

In testimony whereof I hereunto sign my name and cause the seal of office to be affixed this 16th day of May, A. D. 1885.

[SEAL.] WM. J. SWAIN, *Comptroller.*

Endorsed: Transcript from comptroller's office. Filed Feb'y 21, 1887. A. J. Houston, clerk.

51 *Judgm't of Court.*

W. N. COLER, Jr.,
vs.
THE CITY OF CLEBURNE. } No. 759.

WEDNESDAY, *February* 23, 1887.

Be it remembered that on this the 23d day of February, A. D. 1887, this cause was called for trial and both parties appeared by

their respective attorneys, and, having filed an agreement in writing wa-ving a jury, announced themselves ready for trial, and the court, having heard the evidence and argument of counsel, orders and adjudges that the plaintiff, W. N. Coler, Jr., take nothing by his suit, and that the defendant, The City of Cleburne, go hence without day and recover of plaintiff all costs in this behalf expended, for which execution may issue.

Motion for New Trial.

In the Circuit Court of the U. S. for the Northern District of *of* Texas, at Dallas.

W. N. COLER, Jr., *vs.* THE CITY OF CLEBURNE.

Now comes W. N. Coler, pl'ff in the above-entitled cause, by his att'ys, Herndon and Cain, and moves the court to grant a new trial in this cause and for the following reasons, to wit:

1st. Because the evidence failed to show any other indebtedness on the part of the def't at the time these bonds were issued and delivered except the indebtedness represented by the bonds sued upon in this suit, and the judgment of the court to the effect that
52 this was an "overissue" and *ultra vires* is erroneous.

2d. Because if there was any other indebtedness at the time these bonds were issued the same was an indebtedness created prior to the amendment of section 9 of act. 8 of the constitution adopted Sept., 1883, and was especially excepted in said amendment, while this debt was incurred and became *in esse* after said amendment was adopted, so that the tax necessary to be levied to pay the interest and sinking fund upon the indebtedness herein sued upon was not and is not prohibited, and the court erred in so holding.

3d. Because the evidence in this cause shows that at the time the debt was created it was provided that all the revenues of the water works should be applied in connection with such tax as is necessary to pay the interest and sinking fund required by law, and there is no evidence showing that the tax necessary to be levied would exceed the tax permitted under the law to be levied, and the burden of such proof (the same being defensive matter) being upon def't and def't having failed to make the same, the judgment of the court was erroneous.

4th. Because the bonds sued upon and produced in this suit were dated on the 1st day of Jan'y, 1884; were registered in the office of the comptroller of public accounts of the State of Texas on the — day of ——, 1884, as required by law. They recite upon their face the purpose for which issued, the law under which they were issued and authorized *and authorized*, and, being in the hands of innocent purchasers, def't is estopped from denying that there was a
53 sufficient amount of property within said city to justify and authorize their issue or that the same were properly and regularly issued.

5. Because the def't has accepted and appropriated the works for

which said bonds were issued, and, having failed to return the same to the person entitled thereto, judgment should have been for pl'ff.

Respectfully submitted,

HERNDON AND CAIN,
Att'ys for Pl'ff.

Endorsed: No. 759. W. N. Coler, Jr., *vs.* The City of Cleburne. Motion for new trial. Filed Febr'y 24, 1887. A. J. Houston, clerk, by Jas. D. Adams, deputy.

Order of Court on Pl'ff's Motion for New Trial.

W. N. COLER, Jr.,
vs.
THE CITY OF CLEBURNE. } No. 759.

SATURDAY, *February* 26, 1887.

This day came the parties, by their attorneys; then came on to be heard the plaintiff's motion to grant a new trial in this cause. The argument of counsel being heard thereon and duly considered, it is the opinion of the court that the law is for the defendant upon said motion. It is therefore ordered that the said motion be, and the same is hereby, overruled and a new trial refused; and thereupon plaintiff in open court excepts to this ruling of the court and gives notice that he will apply for a writ of error.

54 *Pl'ff's Bill of Exceptions.*

In the Circuit Court of the U. S. for the Northern District of Texas, at Dallas.

W. N. COLER, Jr.,
vs.
THE CITY OF CLEBURNE. } No. 759.

Be it remembered that on the trial of this cause, on, to wit, the 21st day of February, A. D. 1887, the following proceedings were had, to wit:

Pl'ff read his original petition, filed May 2nd, 1885, and four supplemental petitions declaring for cause of action on 234 overdue coupons for $35.00 each, with interest thereon at 8% after each became due, amounting, principal and interest figured to Feb'y 22, 1887, to the amount of $8,922.86, and alleging pl'ff to be the *bona fide* owner, holder, and bearer before maturity of said coupons for a valuable consideration paid, and that the bonds from which the coupons were taken were issued by the city of Cleburne, said def't, for the purpose of erecting a complete system of water works for def't, numbered from 1 to 51, inclusive, for one thousand dollars each, bearing date January 1st, 1884, and due 20 years after date, payable to bearer, bearing 7% interest per annum, with semi-annual coupons for $35.00 each, due the first day of July and January of each year thereafter, the first coupon falling due July 1st, 1884

the coupons payable to bearer, the said bonds and coupons made and issued in pursuance of article 420 of the Revised Statutes of the State of Texas and of an ordinance adopted by the city council of said defendant dated Sept. 13, 1883.

The said def't read its pleadings, interposing as a defense the plea of *non est factum*; also that the bonds, although bearing
55 date January 1, 1884, were, in fact, issued and delivered July 3, 1884, and were signed by ex-Mayor W. N. Hodge on July 3, 1884, after he had ceased to be in office, and that J. M. Odell was then and there the mayor of def't city, who refused to sign the bonds, and that the bonds were not legally signed and delivered.

Also that the last assessed value of the taxable property of def't city at the date said bonds were issued and delivered amounted to $1,144,400; that def't city then owed an outstanding debt as follows, to wit:

For donat-on to R. R.	1,695	25
" " " another R. R.	5,000	
Of bonds issued for city hall in defendant city	20,000	
Total amount outstanding debt	26,695	00

And that the then outstanding debt, together with the seven per cent. interest per annum and two per cent. sinking fund provided on the said $51,000.00 of bonds for water works, amounted to more than six per cent. of the last assessment upon all the taxable property of defendant city of Cleburne; that the said issue of $51,000.00 was an excessive issue, and *ultra vires*.

Pl'ff read his general demurrer interposed to said def't's plea of *non est factum*, and the same was considered by the court in his general finding.

The parties agreed in writing, which was filed among the papers, to waive a jury and submit the matters of law and fact to the court.

The pl'ff then offered in evidence the instruments in writing
56 sued on, to wit, the coupons; a copy of one of said coupons is as follows, to wit:

"$35.00. $35.00.

On the first day of July, 1886, the city of Cleburne, State of Texas, will pay to bearer in the city of New York thirty-five dollars, being six months' interest on water-works bond No. 51.

W. N. HODGE, *Mayor.*
W. H. GRAVES, *Secretary.*"

Also pl'ff introduced in evidence one of the bonds from which the coupons were severed, which is as follows, to wit:

1,000. UNITED STATES OF AMERICA. 1,000.

No. 51. $1,000.

The city of Cleburne, in Johnson county, State of Texas, hereby acknowledges that, for value received, it is indebted and bound and

hereby promises to pay unto the Texas Water and Gas Company or bearer, at the —, in the city of New York, at the expiration of twenty years from the date hereof, the sum of one thousand dollars in lawful money of the United States of America, and also that it is bound and will pay interest on said sum of one thousand dollars at the rate of seven per centum per annum on the first days of January and July of each year thereafter to and including the first day of January, A. D. 1904, to the bearer, according to the respective coupons therefor hereto attached, for thirty-five dollars each, signed by the mayor of the city of Cleburne and attested by the secretary of the city of Cleburne, upon presentation at the fiscal agency in New York. This bond is authorized by article 420 of the Revised
57 Statutes of the State of Texas and by an ordinance adopted by the board of aldermen — the city of Cleburne on the 13th day of Sept., 1883, in conformity to said article 420.

This bond is one of a series of fifty-one of like tenor and effect issued for the erection of a complete system of water works, and is secured by an ordinance of the city of Cleburne under the general laws of the State and setting apart all the net revenues of said water works to pay the interest and sinking fund upon the same and requiring the council to annually levy and collect a tax of thirty-five cents on the one hundred dollars' worth of property, if so much shall be required, to pay the interest and two per cent. sinking fund.

It is understood that the city of Cleburne shall have the right to call in any or all the bonds of this series, numbered from one to fifty-one, respectively, at any time after ten years from the date of said bonds, upon first giving public notice thereof in the city organ of the city of Cleburne for three months before the first days of January or July in any year, and interest shall cease from the time they are so called in, respectively.

In witness whereof the mayor of the city of Cleburne hereto signs his name and *and* the city secretary of the city of Cleburne attests, with the seal of the said city of Cleburne hereto affixed, this the first day of January, A. D. 1884.

W. N. HODGE, *Mayor.*

Attest: [L. S.] W. H. GRAVES, *Secretary.*

1,000.

58 The back of said bond is endorsed as follows: "51. $1,000 city of Cleburne water works bond; interest seven per cent., payable July 1st and January 1st of each year. Twenty-years bond. Registered July 12th, 1884. Wm. J. Swain, comptroller."

The pl'ff then introduced evidence, by depositions and documents, proving that the Texas Water and Gas Company, a corporation, through its proper officers, made a written contract with the def't city, through it- proper officers, on Sep. 13, A. D. 1883, to erect for def't a complete system of water works, the material used and the manner of building fully shown in specifications and plans, on or before June the 1st, 1884, in consideration for which the said def't

agreed to pay the builder $51,000 in bonds of $1,000.00 each, payable to bearer 20 years after January 1, 1884, bearing interest at seven per cent., represented by semi-annual coupons for $35.00 each attached thereto, the same to be engraved, signed by its mayor and secretary, and to be delivered to the said Texas Water and Gas Co. upon the completion of said system of water works according to plans and specifications and the acceptance thereof by def't after the same had been duly tested. It was further proven that said contract provided that upon the said works having been tested and the
59 same reported and received by def't that the said builder should be discharged from all further obligations on account of the works. It was further proven that the system of water works were built within the time agreed upon and accepted by the defendant; that on the 13th day of September, 1883, the defendant, by its city council, adopted an ordinance fully authorizing the contract above mentioned. The issue and delivery is here fully inserted:

An ordinance to provide for the construction of water works in the city of Cleburne, to provide for issuing bonds, and to levy a tax to pay interest and create a sinking fund.

Whereas the city council of the city of Cleburne deem it absolutely necessary that some steps should be taken by the city of Cleburne to protect the property of the city and citizens against fire; and whereas it is further manifest that the establishment of an efficient system of water works is the most economical protection against fires; and whereas the Texas Water and Gas Company, a corporation having its chief domicil in the city of Tyler, Smith county, Texas, has made a proposition, with plans and specifications, to construct a complete system of water works in the city of Cleburne and for the city of Cleburne (as per plans and specifications now on file in the office of the city secretary) for fifty-one bonds of the city of Cleburne for one thousand dollars each, with interest at
60 seven per cent. per annum, with coupons attached for interest, payable semi-annually; and whereas the city council of the city of Cleburne has accepted said proposition of the said Texas Water and Gas Company: Now, therefore—

Be it ordained by the city council of the city of Cleburne, That the mayor and city secretary are hereby authorized and fully empowered to execute, sign, and deliver for and in behalf of the city of Cleburne a contract with the Texas Water and Gas Company, a corporation under the laws of Texas, for the construction of a complete system of water works within the corporate limits of the city of Cleburne according to the plans and specifications submitted by the Texas Water and Gas Company, through M. T. Brown, vice-president and general manager of said corporation; and it is further ordained that the mayor is forthwith required to have lithographed fifty-one bonds for one thousand dollars each, due twenty years after date and redeemable at the option of the city at any time after 10 years, with forty coupons attached to each for thirty-five dollars each, payable in the city of New York or in the city of Austin, Texas, the said coupons to fall due the first day of July, 1884, and first day of Jan-

uary, 1885, and on each subsequent first day of July and first day of January for each and every year up to and including the first day of July, 1905, and after said bonds are lithographed the same to be executed, signed, and delivered to the said Texas Water and
61 Gas Company upon the said company's complying with their contract as therein provided.

And it is further ordained by the city council aforesaid that all the revenues realized from operation of water works aforesaid over and above the expenditures in operating the same be, and the same is hereby, appropriated and constitute a fund to pay the interest and create a sinking fund for the final redemption of said bonds as afore provided.

And it is further ordained by the city council aforesaid that the following tax shall be annually levied and collected, and the same is hereby appropriated to pay the interest on water-works bonds hereinbefore authorized to be issued, one-fourth of one per cent. on each one hundred dollars' worth of property, and that this provision shall remain and be in force until the said water-works bonds are fully paid and satisfied, provided nothing herein shall prevent the city from remitting the tax or any part thereof herein provided for in the event the net revenue shall realize a fund sufficient to pay interest and create ten per cent. sinking fund on said water-works bonds.

And it is further ordained that this ordinance take effect from and after its passage.

And it is further ordained by the city council aforesaid that to the above there shall be levied and collected one-tenth of one per cent. under and by virtue of the power of the city to levy and collect an annual tax to defray the current expenses of its local govern-
62 ment, and the same is hereby set apart and appropriated to the payment of the interest and the sinking fund of the bonds herein provided for.

Provided, That this section of this ordinance shall be inoperative for such year or years as it may be found that the tax and revenue heretofore provided for and set apart shall be sufficient to pay the interest and sinking fund as provided.

Passed September 13th, 1883.

Approved September 13, 1883.

Attest: W. N. HODGE, *Mayor.*

(Signed) W. H. GRAVES, *Secretary.*

THE STATE OF TEXAS, *County of Johnson:*

The undersigned, mayor and secretary of the city of Cleburne county and State aforesaid, do hereby certify that the above is a true and correct copy of "An ordinance to provide for the construction of, water works in the city of Cleburne," etc., and it was legally passed and published according to law.

(Signed) W. N. HODGE, *Mayor.*

W. H. GRAVES, *Secretary.*

In testimony whereof I hereunto affix my signature and the seal of said city this 4th day of February, A. D. 1884.

(Signed) W. H. GRAVES, *Secretary.*

That after defendant accepted the water works, on, to wit, July 3 1884, the 51 bonds for $51,000.00 were delivered to the Texas
63 Water and Gas Company and registered by the comptroller of the State; that the defendant before the delivery of said bonds cut off and cancelled the first coupon thereon, maturing July 1, 1884; that the def't took charge of the water works and contracted a sale of said works to another corporation, which corporation operated the works for a time, and afterwards def't resumed the control of said water works and still has possession and uses the same for fire protection and other uses.

It was further proven that the Texas Water and Gas Company sold all of the said bonds and coupons and delivered them to third parties soon after they were received.

There was evidence tending to prove the amount of property assessed for 1884 was $1,144,400, and that representations were made to the comptroller that the actual value of the property of def't subject to taxation, as estimated, was two millions dollars; the rate of tax levied to pay interest on water-works bonds was 35 cents on each $100 of property, and then being collected for 1884. A statement made by the secretary of def't under seal was offered in evidence as follows, to wit:

"MAYOR'S OFFICE OF THE CITY OF CLEBURNE,
CLEBURNE, TEXAS, *February* 12, 1885.

Total valuation of property in the city of Cleburne, assessment of 1884	$1,144,400
Actual value, estimated by many leading citizens	2,000,000
64 Rate of tax to pay interest on water-works bonds, 35 cents on each $100 levied for collection for the year 1884 (now being collected)	4,005 00

The above is a true statement of the condition of tax for water-works bonds.

[SEAL.] W. H. GRAVES,
City Secretary."

It was proven that the actual value was at least 25% greater than than the assesed value. It was further proven that the defendant city, by its city council, on, to wit, July 3, 1884, adopted a resolution authorizing and requesting ex-Mayor W. N. Hodge, whose name had been engraved on the coupons attached to the 51 bonds, to sign the said 51 bonds as and upon the date January 1, 1884, when he was actually the mayor of the city, and that said bonds be signed by W. H. Graves, who was the secretary of the def't January 1, 1884, as well as on July 3, 1884. It was also proven that said 51 bonds were registered by the comptroller of the State of Texas. There was evidence

tending to prove that a statement was made by leading citizens of the def't city in 1884, addressed to the comptroller of the State, representing that the property of the city of Cleburne subject to taxation in 1884 was of the value of two millions dollars. The said statement and verification by secretary of defendant filed in office of comptroller is as follows, to wit:

"We, the undersigned, citizens and business men of the city
65 of Cleburne, have no hesitancy in expressing the opinion that the actual value of the property, real and personal, of the city of Cleburne is fully two millions dollars, and we earnestly request the comptroller of the State to register the Cleburne city water bonds.

W. N. HODGE, *Ex-Mayor.*
H. H. NILES.
TILMAN FOWLER.
G. G. TOWLES.
VOLNEY ROBINSON.
J. H. HOUSE,
Real Est. Ag't.
J. N. ENGLISH.
J. D. BRYAN.
THO'S LAWRENCE.
JESSE J. BAKER.
SOL. LOCKETT.
W. F. RAMSEY.
D. J. BEAVER.
E. M. HEATH.
T. B. ALLEN.
L. M. GUGGENHEIM.
JAMES GRAHAM.
W. J. RUTLEDGE.
W. H. DEAL.

STATE OF TEXAS, *City of Cleburne:*

I, W. H. Graves, secretary of the city of Cleburne, do hereby certify that the parties signing the above paper addressed to the comptroller of the State are personally known to me as reputable citizens and business men of said city, and their judgment in the premises is reliable, some of them being large real estate owners.

In witness whereof I hereto affix my official signature, with the seal of office, at Cleburne, this 10th day of July, A. D. 1884.

[SEAL.] (Signed) W. H. GRAVES,
Sec'ty City of Cleburne.

The def't offered in evidence and proved as follows, to wit: That W. N. Hodge, who signed the 51 bonds, ceased to be mayor
66 in April, 1884; that J. M. Odell became the mayor of def't in April, 1884; that the 51 bonds were signed July 3, 1884; that the city council authorized W. N. Hodge, who was then a private citizen, to sign the bonds on that day, when the bonds bear date, January 1st, 1884; that the water works erected were tested in May

and June, 1884, from time to time, and showed some defects and breaks. It was also proven that the assessment made by defendant of property subject to taxation for the year 1883 was the sum of $975,169.00 and the like assessment for 1884 was $1,144,400.00; that the defendant had outstanding indebtedness before 13th of Sept'r, 1883, of $1,695.25 to the Santa Fé railway; $5,000.00 to the Mexican Central railway, and twenty thousand dollars in bonds issued to erect a city hall for defendant June, 1883, and bear 8% interest per annum.

It was also proven that Mayor J. M. Odell did not furnish a statement of the valuation of property to the comptroller, nor forward him the 51 bonds for registration, and refused to sign more than 40 of said bonds; that the def't city was using and operating the water works, and had been for over 20 months, and that some of the pipes had broken and rusted.

(Endorsed:) No. 759. W. N. Coler, Jr., *vs.* The City of Cleburne. Pl'ff's bill of exceptions. Filed Feb'y 26, 1887. A. J. Houston, clerk.

67 *Order of Court on Bill of Exceptions.*

Upon the aforesaid pleadings and proof the court found the law for the defendant and rendered final judgment for the said defendant and against said pl'ff for costs of suit. Pl'ff then and there, in open court, gave notice of appeal, filed his motion for new trial, which was by the court overruled. Whereupon pl'ff again in open court gave notice of appeal and excepted to the rulings of the court and the findings of the court upon the law applicable, and tenders this his bill of exceptions, and prays that the same be allowed, signed, and sealed by the court.

Feb'y 26th, 1887.

(Signed) A. P. McCORMICK,
U. S. District Judge.

Petition for Writ of Error.

UNITED STATES OF AMERICA, *Northern District of Texas,* } *ss:*

To the honorable justices of the Supreme Court of the United States:

And now comes W. N. Coler, Jr., of the city, county, and State of New York, by Herndon, Cain and Garrison, his attorneys, and complains that in the records and proceedings, and also in the rendition of judgment in a suit between W. N. Coler, Jr., and The City of Cleburne, said defendant, numbered 759 on the docket of said court, at Dallas, tried in the circuit court of the United States for said northern district, at Dallas, at the January term thereof, A. D. eighteen hundred and eighty-seven, and in which judgment was ren-
68 dered against him on the 23 day of February, A. D. eighteen hundred and eighty-seven, manifest error hath intervened, to the great damage of the said W. N. Coler, Jr.

Wherefore he prays for the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court aforesaid.

(Signed) HERNDON, CAIN AND GARRISON,
Attorneys.

Allowed Feb'y 26th, 1887.

(Signed) A. P. McCORMICK,
U. S. Dist. Judge.

Endorsed: Filed Feb'y 26, 1887. A. J. Houston, clerk.

69 (Copy.)

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the northern district of Texas, at Dallas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between W. N. Coler, Jr., as plaintiff, and The City of Cleburne, as defendant, a manifest error hath happened, to the great damage of the said W. N. Coler, Jr., as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 2nd Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 26th day of February, in the year of our Lord one thousand eight hundred and eighty-seven.

A. J. HOUSTON,
Clerk of the Circuit Court of the United States for the Northern District of Texas, at Dallas.

Allowed by—
A. P. McCORMICK,
U. S. District Judge.

70 In the U. S. Court for the Northern District of Texas, at Dallas.

W. N. COLER, JR., *vs.* THE CITY OF CLEBURNE.

Now come the attorneys of the said plaintiff and def't in the above-entitled cause and agree as follows: That when said cause

was tried in said court on the 23d day of February, 1887, a writ of error and citation in due form were granted by the court and the same fully made out, signed, & filed in said cause for the purpose of prosecuting a writ of error by said pl'ff; that since said trial and the filing of said papers the original writ of error has been lost or mislaid and the same cannot now be found. It is, therefore, hereby agreed that the copy of said writ of error attached hereto and made part hereof is a substantial and correct copy of said lost original writ of error, and that the same be now filed as of the date of the original in said cause, & that it be made a part of the tran-
71 script & record, & sent up to the Supreme Court in the place and stead of said original, and that the same shall have all the force & effect that said original might or could have if the same was now on file & made part of the record.

HERNDON & CAIN,
Att'ys for Pl'ff.
LEAKE & HENRY,
JAMES W. BROWN,
Att'ys for Def'ts.

[Endorsed:] No. 759. Cir. court. Filed Sept. 21, 1887. A. J. Houston, clerk, by Jas. D. Adams, deputy.

72 UNITED STATES OF AMERICA, *ss:*

To the City of Cleburne, represented by its mayor, J. L. Gillam, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and northern district of Texas, at Dallas, wherein W. N. Coler, Jr., is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable A. P. McCormick, judge of the United States district court, acting as circuit judge for the northern district of Texas, this the 26 day of February, A. D. 1887.

A. P. McCORMICK,
U. S. District Judge for the Northern District of Texas.

73 [Endorsed:] No. 759. W. N. Coler, Jr., *vs.* The City of Cleburne. Citatione in error. Filed Feb'y 26, 1887. A. J. Houston, clerk.

On this 29th day of August, in the year of our Lord one thousand eight hundred and eighty-seven, personally appeared before me the subscriber, W. F. Morton, a deputy United States marshal for the northern district of Texas, and makes oath that he delivered a true copy of the within citation to J. L. Gillam, mayor of the city of

Cleburne, in the county of Johnson, State of Texas, on this the 29th day of August, 1887, at Cleburne, Texas.

W. F. MORTON,
Deputy U. S. Marshal.

Sworn to and subscribed before me this 29th day of August, A. D. 1887.

A. J. HOUSTON,
Clerk U. S. Circuit Court, North. Dist. Texas, at Dallas.
By JAS. D. ADAMS,
Deputy Clerk.

74 *Bond for Writ of Error.*

Know all men by these presents that we, W. N. Coler, Jr., as principal, and T. R. Bonner and E. C. Williams, as sureties, are held and firmly bound unto The City of Cleburne in the full and just sum of five hundred dollars, to be paid to the said The City of Cleburne's certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 26th day of February, in the year of our Lord one thousand eight hundred and eighty-seven.

Whereas lately at a regular term of the circuit court of the United States for the northern district of Texas, at Dallas, in a suit depending in said court between W. N. Coler, Jr., as plaintiff, and The City of Cleburne, as defendant, a final judgment for costs was rendered against the said W. N. Coler, Jr., said plaintiff, on the 23d day of Feb'ry, 1887; and the said W. N. Coler, Jr., plaintiff, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation, directed to the said The City of Cleburne, citing and admonishing def't to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said W. N. Coler, Jr., plaintiff in error, shall prosecute his writ of error to effect and answer all damages and costs if plaintiff fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) W. N. COLER, JR. [SEAL.]
T. R. BONNER. [SEAL.]
E. C. WILLIAMS. [SEAL.]

Sealed and delivered in presence of—
W. S. HERNDON.
B. B. CAIN.

Approved by—
A. P. McCORMICK,
U. S. District Judge, N. D. of Texas.

Endorsed: W. N. Coler, Jr., *vs.* The City of Cleburne. Bond for writ of error. Filed Feb'y 26, 1887. A. J. Houston, clerk.

75 *Assign't of Errors.*

In the U. S. Circuit Court for the Northern District of Texas, at Dallas.

W. N. COLER, Jr., *vs.* THE CITY OF CLEBURNE.

Assignment of errors made by said plaintiff in the above-entitled cause, to be filed and annexed to the writ of error and sent up with the record in this cause to the Supreme Court of the United States.

Errors assigned.

1st. The court erred in overruling plaintiff's demurrer to defendant's plea of *non est factum* because said plea was special and failed to exclude the idea that the defendant had authorized the person who actually signed the bonds and coupons to do so.

2d. Plaintiff's suit is upon negotiable paper purchased *bona fide* before maturity, for value, and is an innocent holder without notice of any vice between the original parties to the contract or in the issuance and delivery of the said negotiable instruments; and the court erred in holding that plaintiff could not recover thereon.

3d. The 51 bonds and coupons are dated January 1st, 1884. The mayor and secretary who signed the bonds were in office on that day, but the said bonds were actually signed July 3d, 1884, and W. N. Hodge had ceased to be mayor in the meantime. The ordinance of Sept. 13th, 1883, being a part of the contract for and authorizing the issue of said bonds, provided that the bonds should be lithographed and signed forthwith by the mayor and secretary, ready for delivery on or before June 1st, 1884, and the interest to run
76 from January 1st, 1884. The contract was complied with and accepted by defendant, and after the acceptance by def't city a resolution was adopted by defendant authorizing and directing W. N. Hodge, ex-mayor, and the secretary then and there to sign the said bonds bearing date January 1, 1884; and the def't cut off the first coupon, due July 1st, 1884, from said bonds and then delivered the said 51 bonds to the Texas Water and Gas Co., the contractor who built the water works, and the said bonds were forwarded to the comptroller of the State of Texas for registration under the law, and the same were duly registered by that officer and delivered to said contractor, and afterwards sold and delivered to pl'ff. It was error for the court to hold, under this state of facts, that the defendant could interpose the defense of failure of consideration, irregularity in the issue, delivery, or registration of said bonds.

4th. It was error for the court to hold that the plea of *ultra vires* was sufficient, because the total indebtedness of defendant was shown to —, including the bonds, 77,695 dollars, and more than six per

cent. of the last assessment upon all taxable property of the defendant city, because the amendment to the constitution took effect 25th of Sept'r, 1883, providing the limitation, and $20,000 of the $77,695 was not reached by the amendment. It was prior indebtedness because, further, the act of registration was not limited to the last assessed value of the taxable property, but to the value of
77 all taxable property, real and personal, in the city, together with a statement of the amount of tax levied for the payment of interest and to create a sinking fund; and because, further, all the net revenue of said water works were set apart in addition to the levy of thirty-five cents on the one hundred dollars of the taxable property of the city to pay the interest and sinking — upon the said fifty-one bonds; and because, further, the act of the comptroller was a judicial act determined solely by him under the law and the evidence adduced, and his act of registration of said bonds was conclusive as to the regularity of the issuance of said bonds and the levy and collection of a tax sufficient to pay the interest and sinking fund on said bonds; and the defendant is estopped from interposing the plea of excessive issue of bonds in violation of the law limiting the amount of bonds that may be issued and providing for the interest and sinking fund to pay the same.

5th. The court erred in overruling the pl'ff's motion for a new trial on the grounds therein stated, and especially for the reason that there was no evidence tending to show that there was any other or further indebtedness of the def't then *in esse* except the 51 bonds here sued for, and for the further reason that the def't has received and appropriated the water works for which said bonds were issued, and is now using and enjoying the same without having
78 paid any consideration for the same whatever.

(Signed) HERNDON, CAIN AND GARRISON,
Att'ys for Pl'ff W. N. Coler, Jr.

Endorsed: No. 759. W. N. Coler, Jr., *vs.* The City of Cleburne. Assignment of errors. Filed July 7, 1887. A. J. Houston, clerk, by Jas. D. Adams, deputy.

79 UNITED STATES OF AMERICA,
Northern District of Texas, at Dallas:

I, A. J. Houston, clerk of the United States circuit court for the northern district of Texas, at Dallas, do hereby certify that the foregoing 77 pages contain a full, true, and correct transcript of the opening order of the court, plaintiff's original petition, with Exhibit "B," defendant's original answer, order to amend answer, first amended answer, argument of attorneys (first and second amended petitions were lost or mislaid while in the hands of the attorneys, but were before the court on the trial of the cause and are fully covered by this agreement), third amended petition, with Exhibit "A," order to amend answer, second amended answer, argument setting time for trial and waiving jury, order for continuance, plaintiff's demurrer to plea, fourth amended petition, with Exhibit "A," fifth supplemental petition, with Exhibit "B," water-works contract,

transcript from comptroller's office, judgment, motion for new trial, plaintiff's bill of exceptions, order of court on bill of exceptions, petition for writ of error, copy of writ of error, bond for writ of error, assignment of errors and the originals of the argument of attorneys, citation in error, and the clerk's certificate in cause No. 759, law, on the docket of said court, and styled W. N. Coler, Jr., *vs.* The City of Cleburne, all of which appears from the records of said court.

80 In testimony whereof I have hereunto affixed the seal of said court, at Dallas, Texas, and the signature of the clerk thereof this 24th day of September, A. D. 1887.

[The Seal of the U. S. Circuit Court, Northern Dist. Texas, Dallas.]

A. J. HOUSTON, *Clerk.*

Endorsed on cover: N. Texas C. C. U. S. No. 1087. W. N. Coler, Jr., plaintiff in error, *vs.* The City of Cleburne. Filed October 1, 1887.

In Supreme Court of the United States of America,

WASHINGTON, D. C.

W. N. COLER, JR., APPELLANT,

VS.

THE CITY OF CLEBURNE, APPELLEE.

BRIEF OF APPELLANT.

STATEMENT OF THE CASE.

This is a suit brought by W. N. Coler, Jr., a citizen of New York City, against the City of Cleburne, a body politic and corporate under the laws of Texas, for and upon 234 coupons of the value of $35.00 each, total $8190.00, cut from a series of fifty-one bonds of $1,000 each, made, executed and delivered by the said City of Cleburne to the Texas Water and Gas Co., and payable to it or bearer at the expiration of twenty years from this date, which was and is the first day of January, 1884. Said bonds were made and delivered under and by virtue of Article 420 of the Revised Statutes of the State of Texas. They bear 7 per cent. interest from date and the interest is payable semi-annually on the first day of July and the first day of January of each year, said interest represented by the coupons, part of which are included in this suit.

The coupons sued upon are particularly described in the plaintiff's original petition filed May 2, 1885, and in four amended petitions subsequently filed as appears in Transcript pp. 2 to 22 inclusive.

A substantial copy of one of said coupons is as follows, to-wit:

"$35.00. $35.00.

"On the first day of January, 1887, the City of Cleburne, State of Texas, will pay to bearer, in the City of New York,

thirty-five dollars, being six months' interest due on water-works bond No. 25.

"W. N. HODGE, Mayor.
"W. H. GRAVES, Secretary."

A substantial copy of one of the bonds from which said coupons are clipped is as follows:

1,000. UNITED STATES OF AMERICA. 1,000.
No. 51. $1,000.

The City of Cleburne, in Johnson county, State of Texas, hereby acknowledges that, for value received, it is indebted and bound and hereby promises to pay unto the Texas Water and Gas Company or bearer, at the ——, in the City of New York, at the expiration of twenty years from the date hereof, the sum of one thousand dollars in lawful money of the United States of America, and also that it is bound and will pay interest on said sum of one thousand dollars at the rate of seven per centum per annum on the first days of January and July of each year thereafter to and including the first day of January, A. D. 1904, to the bearer, according to the respective coupons therefor hereto attached, for thirty-five dollars each, signed by the mayor of the City of Cleburne and attested by the secretary of the City of Cleburne, upon presentation at the fiscal agency in New York. This bond is authorized by Article 420 of the Revised Statutes of the State of Texas and by an ordinance adopted by the board of aldermen of the City of Cleburne on the 13th day of September, 1883, in conformity to said article 420.

This bond is one of a series of fifty-one of like tenor and effect issued for the erection of a complete system of water-works, and is secured by an ordinance of the City of Cleburne under the general laws of the State and setting apart all the net revenues of said water works to pay the interest and sinking fund upon the same and requiring the council to annually levy and collect a tax of thirty-five cents on the one hundred dollars' worth of property, if so much shall be required, to pay the interest and two per cent. sinking fund.

It is understood that the City of Cleburne shall have the right to call in any or all the bonds of this series, numbered from one to fifty-one, respectively, at any time after ten years from

the date of said bonds, upon first giving public notice thereof in the city organ of the City of Cleburne for three months before the first days of January or July in any year, and interest shall cease from the time they were so called in, respectively.

In witness whereof the mayor of the City of Cleburne hereto signs his name and and the city secretary of the City of Cleburne attests, with the seal of the said City of Cleburne hereto affixed, this the first day of January, A. D. 1884.

W. N. HODGE, Mayor.

Attest: [L. S.] W. H. GRAVES, Secretary.

The back of said bond is endorsed as follows: "51. $1,000 City of Cleburne water works bond; interest seven per cent., payable July 1st and January 1st of each year. Twenty years bond. Registered July 12, 1884.

WM J. SWAIN, Comptroller."

September 13, 1883, the mayor and board of aldermen, acting under and by virtue of Sec. 420 of the Revised Statutes of the State of Texas and its powers as a corporate body under the General Laws of said State, enacted the following ordinance, to-wit:

An ordinance to provide for the construction of water works in the City of Cleburne, to provide for issuing bonds, and to levy a tax to pay interest and create a sinking fund.

Whereas the city council of the City of Cleburne deem it absolutely necessary that some steps should be taken by the City of Cleburne to protect the property of the city and citizens against fire; and whereas it is further manifest that the establishment of an efficient system of water works is the most economical protection against fires; and whereas the Texas Water and Gas Company, a corporation having its chief domicil in the City of Tyler, Smith county, Texas, has made a proposition, with plans and specifications, to construct a complete system of water works in the City of Cleburne and for the City of Cleburne (as per plans and specifications now on file in the office of the city secretary) for fifty-one bonds of the City of Cleburne for one thousand dollars each, with interest at seven per cent. per annum, with coupons attached for interest, payable semi-annually; and whereas the

city council of the City of Cleburne has accepted said proposition of the said Texas Water and Gas Company: Now, therefore—

Be it ordained by the city council of the City of Cleburne, That the mayor and city secretary are hereby authorized and fully empowered to execute, sign, and deliver for and in behalf of the City of Cleburne a contract with the Texas Water and Gas Company, a corporation under the laws of Texas, for the construction of a complete system of water works within the corporate limits of the City of Cleburne according to the plans and specifications submitted by the Texas Water and Gas company, through M. T. Brown, vice-president and general manager of said corporation; and it is further ordained that the mayor is forthwith required to have lithographed fifty-one bonds for one thousand dollars each, due twenty years after date and redeemable at the option of the city at any time after ten years, with forty coupons attached to each for thirty-five dollars each, payable in the City of New York or in Austin, Texas, the said coupons to fall due the first day of July, 1884, and first day of January, 1885, and on each subsequent first day of July and first day of January for each and every year up to and including the first day of July, 1905, and after said bonds are lithographed the same to be executed, signed, and delivered to the said Texas Water and Gas Company upon the said company's complying with their contract as therein provided.

And it is further ordained by the city council aforesaid that all the revenues realized from the operation of water works aforesaid over and above the expenditures in operating the same be, and the same is hereby, appropriated and constitute a fund to pay the interest and create a sinking fund for the final redemption of said bonds as afore provided.

And it is further ordained by the city council aforesaid that the following tax shall be annually levied and collected, and the same is hereby appropriated to pay the interest on water works bonds hereinbefore authorized to be issued, one-fourth of one per cent. on each one hundred dollars worth of property, and that this provision shall remain and be in force until the said water works bonds are fully paid and satisfied, pro-

vided nothing herein shall prevent the city from remitting the tax or any part thereof herein provided for in the event the net revenue shall realize a fund sufficient to pay interest and create ten per cent. sinking fund on said water works bonds.

And it is further ordained that this ordinance take effect from and after its passage.

And it is further ordained by the city council aforesaid that to the above there shall be levied and collected one-tenth of one per cent. under and by virtue of the power of the city to levy and collect an annual tax to defray the current expenses of its local government, and the same is hereby set apart and appropriated to the payment of the interest and the sinking fund of the bonds herein provided for.

Provided, That this section of this ordinance shall be inoperative for such year or years as it may be found that the tax and revenue heretofore provided for and set apart shall be sufficient to pay the interest and sinking fund as provided.

Passed September 13, 1883.
Approved September 13, 1883.

Attest: W. N. HODGE, Mayor.
(Signed) W. H. GRAVES, Secretars.

THE STATE OF TEXAS, County of Johnson:

The undersigned, mayor and secretary of the City of Cleburne, county and State aforesaid, do hereby certify that the above is a true and correct copy of "An ordinance to provide for the construction of water works in the City of Cleburne," etc., and it was legally passed and published according to law.

(Signed) W. N. HODGE, Mayor.
" W. H. GRAVES, Secretary.

See Tran. pp. 32, 33.

Immediately after the passage of said ordinance, to-wit: on the 13th day of September, 1883, the City of Cleburne, acting by and through its mayor and council, and the Texas Water and Gas Company by its vice-president and general manager, M. T. Brown, made and entered into the following contract:

WATER WORKS CONTRACT.

This contract, made and entered into this 13th day of September, A. D. 1883, by and between the City of Cleburne, a municipal corporation of the county of Johnson, State of

Texas, hereinafter styled the party of the first part, and the Texas Water and Gas Company, a corporation of the city of Tyler, county of Smith, State of Texas, and hereinafter styled party of the second part, witnesseth: That whereas the City of Cleburne, through and by the city council of the said City of Cleburne, deem it necessary to provide for an efficient protection of the property of the tax-payers of the City of Cleburne from fire, and also to secure to the citizens of the said city a supply of water for domestic purposes, etc.

Therefore, the party of the first part, by her mayor, W. N. Hodge, duly attested by W. H. Graves, secretary of said City of Cleburne, in accordance with an ordinance of the city council approved on the 13th day of September, A. D. 1883, do agree, promise, and obligate to deliver to the party of the second part fifty-one bonds, of one thousand dollars each, due and payable twenty years after date, with interest at seven per cent. per annum, payable semi-annually, the said interest to be secured by forty coupons attached to said bonds for thirty-five dollars each, due on the first day of July, 1884, and January 1885, after the signing — this contract, and on each subsequent first day of July and January — and including the first day of July, 1905, and to be delivered at the time and upon the condition hereinafter specified and upon terms as hereinafter stated; and the party of the second part doth agree and obligate itself to build and constract, furnish all material therefor, a complete system of water works, according to plans and specifications herewith filed and made a part of this contract, within the City of Cleburne, and that the same shall be completed and submitted to a test hereinafter specified by or before the first day of June, A. D. 1884; and the party of the second part doth further agree that when said works are completed that they shall be submitted to a thorough test of two hundred pounds pressure to the square inch, and that the said system shall be capable of throwing four fire streams at one time from any four hydrants through fifty feet of 2 1-2 inch rubber hose (or any pipes not smaller than six inches) with one-inch nozzle to height of eighty feet.

And the party of the first part doth obligate and bind itself to receive and accept said works upon their completion and

the testing thereof as aforesaid; and the party of the first part hereby agree that it will deliver to the party of the second part the bonds mentioned in the first part of this contract, upon the party of the second part completing works as per plans and specifications therefor; and it is further agreed that if the said bonds are not sooner delivered, as herein provided, that then the said bonds shall be delivered upon the completion and acceptance of the system of water works herein contracted to be built; and it is further understood that the test herein provided for shall be made in the presence of a committee of the aldermen of the City of Cleburne, and upon a favorable report of the said committee the said party of the second part shall be discharged from further obligations in the premises.

It is further agreed between the party of the first and the party of the second part that the city shall have the option to redeem said bonds at the expiration of ten years or any time thereafter after giving due notice.

W. N. HODGE,
Mayor of the City of Cleburne.
M. T. BROWN,
Vice-Pres., Gen. Manager of the Texas Water and Gas Co.
Attest: W. H. GRAVES,
City Secretary. Tr. pp. 22 and 23.

The water works were built within the time agreed upon and accepted according to the contract and the city took charge of them and conducted a sale of said works to another corporation, which corporation operated the works for a time and afterwards defendant resumed control and still has possession and uses the same. Tr. p. 34.

After said works had been accepted, to-wit: July 3, 1884, the city cut off and cancelled the first coupon, maturing July 1, 1884, and then delivered the fifty-one bonds to the Texas Water and Gas Company and they were registered by the Comptroller as provided in Article 423 of the Revised Statutes, State of Texas. Tr. p. 34.

Plaintiff bought the coupons in suit in the due course of trade, before maturity, for value, and without notice of any irregularity in their issue. Tr. p. 34.

The city refused to pay the same and plaintiff filed this suit.

The defense made by the city is a plea of non est factum, to-wit: That W. N. Hodge, who signed the fifty-one bonds, ceased to be mayor in April 1884, and was succeeded by J. M. Odell, whereas the bonds were in fact sigind July 3, 1884, but the bonds bear date January 1, 1884, and in addition to to this the city adopted a resolution authorizing and requesting ex-mayor W. N. Hodge, whose name had been engraved on the coupons attached to the fifty-one bonds, to sign the said bonds as of date January 1, 1884, when he was acting mayor. See Tr. pp. 34 and 35.

Another defense made by the city is that it is a municipal corporation, organized under and by virtue of title xvii of the Revised Statutes of Texas, and at its organization it was and has ever been, and now is, a city exceeding 1000 inhabitants and not exceeding 5000 inhabitants, and that at the date these bonds were issued the outstanding valid indebtedness of the city was as follows, to-wit: $1,695.25 with 8 per cent. interest per annum since September 11, 1881, represented by city script issued to the G. C. & S. F. R'y Co.; $5,000 bearing interest at the rate of 8 per cent. per annum, represented by city script issued to the G. C. & S. F. R'y Co. by authority of ordinance September 13, 1881, and $20,000 represented by forty bonds of $500 each, bearing interest from date at the rate of 8 per cent. per annum, payable semi-annually, payable in five twenty years, by ordinance passed June 27, 1883, providing for the erection of a city hall, and that this indebtedness, augmented by the fifty-one bonds for water works, would exceed 6 per cent. of the values of all taxable property, real and personal, and the acts of the city in issuing this indebtedness were and are ultra vires. Tr. p. 15.

Upon this issue there was evidence to prove that the assessment of property by defendant for the year 1883, was $975,169. That the assessment for 1884, was $1,144,400, and that the defendant had outstanding indebtedness before 13th of September, 1883, of $1,695.25 to the Santa Fe R'y; $5,000 to the M. C. R'y, and $20,000 in bonds issued to erect a city hall, all bearing 8 per cent. per annum. Tr. p. 36.

The mayor did not furnish a statement to the Comptroller

nor forward the fifty-one bonds for registration, but on the other hand it was shown that the actual or real value of the property in said city was at least 25 per cent. greater than the assessed value, and a statement was made to the Comptroller by many leading citizens, representing that that the property subject to taxation in said city for the year 1884, was of the value of $2,000,000. Tr. pp. 34 and 35.

The rate of tax levied to pay interest on water works bonds was 35 cents on each $100 worth of personal property then being collected for 1884. Tr. p. 54.

The bonds were presented to the Comptroller with a statement of the assessed value of real and personal property for 1883 and a copy of ordinance authorizing issuance of the $20,000 of bonds for city hall; the ordinance authorizing issuance of the fifty-one bonds in suit and statement of citizens to the effect that the real value was $2,000,000 in 1884, dated July 10, 1884, and the Comptroller registered the fifty-one bonds. Tr. pp. 24 to 27 inclusive.

Defendants also plead failure of consideration (Tr. p. 16) and proved that some of the pipes had broken and rusted.

Upon all the pleadings and proof, the court gave judgment for defendant and against plaintiff for cost of suit. Plaintiff in open court gave notice of appeal and filed his motion for new trial, which was by the court overruled, and plaintiff again excepted, gave notice of appeal and filed his bill of exceptions, February 26, 1887. (See Tr. p. 36.) February 26, 1887, plaintiff filed petition for writ of error to this Hon. Court with his bond, and on the same day said writ was allowed, (Tr. pp. 36 and 37) and citation in error was then and there issued and placed in the hands of U. S. Marshal, which was served on the 29th day of August, 1887.

July 7, 1887, plaintiff filed the following assignment of errors which he now submits to this Hon. Court:

ERRORS ASSIGNED.

1st. The court erred in overruling plaintiff's demurrer to defendant's plea of non est factum because said plea was special and failed to exclude the idea that the defendant had authorized the person who actually signed the bonds and coupons to do so.

2d. Plaintiff's suit is upon negotiable paper purchased bona fide before maturity, for value, and is an innocent holder without notice of any vice between the original parties to the contract or in the issuance and delivery of the said negotiable instruments; and the court erred in holding that plaintiff could not recover thereon.

3d. The fifty-one bonds and coupons are dated January 1, 1884. The mayor and secretary who signed the bonds were in office on that day, but the said bonds were actually signed July 3, 1883, and W. N. Hodge had ceased to be mayor in the meantime. The ordinance of September 13, 1883, being a part of the contract for and authorizing the issue of said bonds, provided that the bonds should be lithographed and signed forthwith by the mayor and secretary, ready for delivery on or before June 1, 1884, and the interest to run from January 1, 1884. The contract was complied with and accepted by defendant, and after the acceptance by defendant city a resolution was adopted by defendant authorizing and directing W. N. Hodge, ex-mayor, and the secretary then and there to sign the said bonds bearing date January 1, 1884; and the defendant cut off the first coupon, due July 1, 1884, from said bonds and then delivered the said fifty-one bonds to the Texas Water and Gas Company, the contractor who built the water works, and the said bonds were forwarded to the Comptroller of the State of Texas for registration under the law, and the same were duly registered by that officer and delivered to said contractor, and afterwards sold and delivered to plaintiff. It was error for the court to hold, under this state of facts, that the defendant could interpose the defense of failure of consideration, irregularity in the issue, delivery, or registration of said bonds.

4th. It was error for the court to hold that the plea of ultra vires was sufficient, because the total indebtedness of defendant was shown to be, including the bonds, $77,695, and more than six per cent. of the last assessment upon all taxable property of the defendat city, because the amendment to the constitution took effect 25th of September, 1883, providing the limitation, and $20,000 of the $77,695 was not reached by the amendment. It was prior indebtedness because, fur-

ther, the act of registration was not limited to the last assessed value of the taxable property, but to the value of all taxable property, real and personal, in the city, together with a statement of the amount of tax levied for the payment of interest and to create a sinking fund; and because, further, all the net revenue of said water works were set apart in addition to the levy of thirty-five cents on the one hundred dollars of the taxable property of the city to pay the interest and sinking fund upon the said fifty-one bonds; and because, further, the act of the Comproller was a judicial act determined solely by him under the law and evidence adduced, and his act of registration of said bonds was conclusive as to the regularity of the issuance of said bonds and the levy and collection of a tax sufficient to pay the interest and sinking fund on said bonds; and the defendant is estopped from interposing the plea of excessive issue of bonds in violation of the law limiting the amount of bonds that may be issued and providing for the interest and sinking fund to pay the same.

5th. The court erred in overruling the plaintiff's motion for a new trial on the grounds therein stated, and especially for the reason that there was no evidence tending to show that there was any other or further indebtedness of the defendant then in esse except the fifty-one bonds here sued for, and for the further reason that the defendant has received and appropriated the water works for which said bonds were issued, and is now using and enjoying the same without having paid any consideration for the same whatever.

FIRST ASSIGNMENT OF ERROR.

The court erred in overruling plaintiff's demurrer to defendant's plea of non est factum, because said plea was special and failed to exclude the idea that the defendant had authorized the person who actually signed the bonds and coupons, to do so.

PROPOSITION:—It is not necessary to the validity of an instrument that it be signed actually by the person whose acts it purports to be, but if it is authorized by the party who utters it, he is estopped from dennying its genuineness. A corporation can only act by agents, and a plea of non est factum made by it must relate and be directed to the authority of the person who has assumed to act for it.

STATEMENT:—The defendant's plea of non est factum recites that the bonds were not signed by J. M. Odell, the then mayor, nor by his authority, nor by and person authorized by law to act as mayor of defendant, but does not negative the idea that they may have been ~~required~~ signed by a person authorized by defendant, or by law, to ~~require~~ sign them. Tr. p. 14.

AUTHORITIES:—

SECOND AND THIRD ASSIGNMENTS OF ERROR.

2d. Plaintiff's suit is upon negotiable paper purchased bona fide before maturity, for value, and is an innocent holder without notice of any vice between the original parties to the contract or in the issuance and delivery of the said negotiable instruments; and the court erred in holding that plaintiff could not recover thereon.

3d. The fifty-one bonds and coupons are dated January 1, 1884. The mayor and secretary who signed the bonds were in office on that day, but the said bonds were actually signed July 3, 1883, and W. N. Hodge had ceased to be mayor in the meantime. The ordinance of September 13, 1883, being a part of the contract for and authorizing the issue of said bonds, provided that the bonds should be lithographed and signed forthwith by the mayor and secretary, ready for delivery on or before June 1, 1884, and the interest to run from January 1, 1884. The contract was complied with and accepted by defendant, and after the acceptance by defendant city a resolution was adopted by defendant authorizing and directing W. N. Hodge, ex-mayor, and the secretary then and there to sign the said bonds bearing date January 1, 1884; and the defendant cut off the first coupon, due July 1, 1884, from said bonds and then delivered the said fifty-one bonds to the Texas Water and Gas Company, the contractor who built the water works, and the said bonds were forwarded to the Comptroller of the State of Texas for registration under the law, and the

same were duly registered by that officer and delivered to said contractor, and afterwards sold and delivered to plaintiff. It was error for the court to hold, under this state of facts, that the defendant could interpose the defense of failure of consideration, irregularity in the issue, delivery, or registration of said bonds.

FIRST PROPOSITION:—Plaintiff being a bona fide holder was not required to look beyond the recitals in the bond and the legislative enactments giving the power to issue them.

If at the date of the bond it was authorized by law and appears to have been properly issued in accordance with the enobling acts, he must recover, though there may have been irregularity and even fraud or misconduct on the part of the agents who acted for the city in uttering them.

STATEMENT:—The bonds bear date January 1, 1884. At that time W. N. Hodge was the mayor of this city, and his signature appears upon the bonds and on the coupons. (See statement above.) This is the only ground of irregularity and is the basis of plea of non est factum.

AUTHORITIES:—

Weyanwego vs. Ayling, 99 U. S. 112.
Walnut vs. Wade, 103 U. S. 683.
Town of East Lynne vs. Davenport, 94 U. S. 801.
Clay county vs. Society for Savings, 104 U. S. 579.
County of Moultrie vs. Saving's Bank, 92 U. S. 631.
Naman vs. Ritter, 97 U. S. 389.

SECOND PROPOSITION:—The ordinance adopted by defendant city, September 13, 1883, became a part of the contract and was the authority to the then mayor, W. N. Hodge, and the secretary, to draft and sign the bonds, ready for delivery, before January 1, 1884. The bonds and coupons having been signed in accordance with said ordinance, the innocent purchaser was not required to look beyond this, and the defendant city having uttered the bond thus required is estopped from denying its regularity and validity.

FOURTH ASSIGNMENT OF ERROR.

4th. It was error for the court to hold that the plea of ultra vires was sufficient, because the total indebtedness of

defendant was shown to be, including the bonds, $77,695, and more than six per cent. of the last assessment upon all taxable property of the defendat city, because the amendment to the constitution took effect 25th of September, 1883, providing the limitation, and $20,000 of the $77,695 was not reached by the amendment. It was prior indebtedness because, further, the act of resignation was not limited to the last assessed value of the taxable property, but to the value of all taxable property, real and personal, in the city, together with a statement of the amount of tax levied for the payment of interest and to create a sinking fund; and because, further; all the net revenue of said water works were set apart in addition to the levy of thirty-five cents on the one hundred dollars of the taxable property of the city to pay the interest and sinking fund upon the said fifty-one bonds; and because, further, the act of the Comproller was a judicial act determined solely by him under the law and evidence adduced, and his act of registration of said bonds was conclusive as to the regularity of the issuance of said bonds and the levy and collection of a tax sufficient to pay the interest and sinking fund on said bonds; and the defendant is estopped from interposing the plea of excessive issue of bonds in violation of the law limiting the amount of bonds that may be issued and providing for the interest and sinking fund to pay the same.

First Proposition:—The registration of the bonds by the Comptroller being an act which must, under the law, be based on a determination of the value of all taxable property and a status of the bonded debt of the city, the endorsement of registration on the bond is, in effect, such a recital of compliance on the bonds as will be binding on the municipality as against an innocent purchaser. Such a purchase need not go behind this recital to inquire whether the amount of indebtedness of the corporation exceeded that authorized or not. The corporation is estopped from denying their validity on this account.

2d. The act of registration by the Comptroller is a judicial act determined upon information then in his possession. Declaring for or against the registration of the bond is the exercise of a wise discretion by a judicial officer clothed with this

power, and is not the subject of revision by another tribunal. Such power having been exercised and the bond registered, the innocent purchaser may rely upon such judicial decision in favor of the regularity and validity of the bond.

STATEMENT:—The bonds are endorsed as follows: "Registered July 12, 1884. W. J. SWAIN, Comptroller."

AUTHORITIES:—

Arts. 323 and 424, Revised Statutes of Texas.
Sherman county vs. Simons, 109 U. S. 735.
Anderson county vs. Bear, 113 U. S. 227.
Town of Colona vs. Eaves, 92 U. S. 484.
Commissioners vs. Bolls, 94 U. S. 104.
Commissioners vs. Clark, 94 U. S. 278.

SECOND PROPOSITION:—The city is not bound by the assessed value of property, but if the aggregate amount of bonds issued by the city council, including those in suit, did not exceed six per cent. of the *actual* value of the property within said city subject to ad valorem tax at the time they were issued, the issue is not excessive.

STATEMENT:—These bonds were issued on the 1st day of January, 1884, and the first interest did not fall due till July 1, 1884. The *actual* value of property subject to ad valorem tax in the city was then $2,000,000. A statement to this effect was made to the Comptroller by leading citizens and a certificate of W. H. Graves, city secretary, and upon this the Comptroller registered the bonds. Tr. pp. 34 and 35.

AUTHORITIES:—

Revised Statutes of Texas, Art. 420.

THIRD PROPOSITION:—The bonds in this suit were and are issued under and subject to Constitution, Art. 8, Sec. 9 thereof, as amended September 25, 1883. Said amendment authorizes the levy of an additional tax of 25 cents on the $100, and excepts the $20,000 voted for the erection of a city hall; therefore the issuance of the bonds in this suit are not excessive.

STATEMENT:—The total indebtedness of the city when these bonds were issued was $77,695. Twenty thousand dollars deducted from this amount leaves $57,695, which is not an ex-

cessive issue even upon the assessed valuation. It is true that the contract was made on the 13th day of September, 1883, and the Constitutional amendment d'd not go into effect until the 25th of September, 1883, twelve days thereafter, but was voted upon the first Tuesday in August, 1883, and adopted then, and declared adopted officially September 25, 1883. But the bonds were issued on the first day of January, 1884, and a bona fide purchaser before maturity for value was only required to look to the law and facts that existed at the date the bonds were issued.

AUTHORITES :—

See Amendment to Art. 8, Sec. 9, Constitution of Tex.

FOURTH PROPOSITION :—The bonds sued upon are not ultra vires unless it was necessary, in order to pay interest and 2 per cent sinking fund, to levy an excessive tax; and to decide what tax should be levied for this purpose the court should have first deducted the annual net revenue from the water works.

STATEMENT :—The bonds recite on their face: "This bond is one of a series of fifty-one of like tenor and effect issued for the erection of a complete system of water works, and is secured by an ordinance of the City of Cleburne under the general laws of the State, and setting apart all the net revenues of said water works to pay the interest and sinking fund upon the same, and requiring the council to annually levy and collect a tax of 35 cents on the $100 worth of property, if so much shall be required to pay the interest and 2 per cent. sinking fund." Tr. pp. 30, 31.

The ordinance for construction of water works provides that "All revenues realized from operation of water works over and above the expenditures in operating the same, be and the same is hereby appropriated and constituted a fund to pay the interest and create a sinking fund for the final redemption of said bonds, as hereinbefore provided; and it is further ordained by the city council aforesaid that the following tax shall be annually levied and collected, and the same is hereby appropriated to pay interest on water works bonds hereinbefore authorized to be issued: One-fourth of one per cent. on each one hundred dollars' worth of property, and that this provision shall remain

in force and effect until the said water works bonds are fully paid and satisfied, provided nothing herein shall prevent the city from remitting the tax or any part thereof herein provided for in the event the net revenue shall realize a fund sufficient to pay interest and create two per cent. sinking fund on said water works bonds; and it is furthur ordained that this ordinance take effect on and after its passage.

And it is further ordained by the city council aforesaid that to the above there shall be levied and collected one-tenth of one per cent. under and by virtue of the power of the city to levy and collect an annual tax to defray the current exepenses of its local government, and the same is hereby set apart and appropriated to payment of the interest and the sinking fund of the bonds herein provided for: Provided, that this section of this ordinance shall be inoperative for such year or years as it may be found that the tax and revenue heretofore provided for and set apart shall be sufficient to pay the interest and sinking funds as provided."

The record shows no proof as to what the net revenues from water works are, though it does show that defendant had used and operated the works for over twenty months. Tr. p. 36. The burden of proof being upon the defendant, it was their duty to show the revenue, and the court should have considered this before deciding as he did.

FIFTH ASSIGNMENT OF ERROR.

The court erred in overruling the plaintiff's motion for a new trial on the grounds therein stated, and especially for the reason that there was no evidence tending to show that there was any other or further indebtedness of the defendant then *in esse* except the fifty-one bonds here sued for, and for the further reason that the defendant has received and appropriated the water works for which said bonds were issued, and is now using and enjoying the same without having paid any consideration for the same whatever.

STATEMENT:—The only proof as to other bonded indebtedness is $20,000 to build a city hall. There was proof that defendant had outstanding indebtedness before the 13th of September, 1883, of $1695.25 to the Santa Fe Railway and $5000 to the Mexican Central Railway, but said last sums are not bonded debts, and may be paid out of the general revenue of the city from any and all sources. It was not shown that these debts or the $20,000 bonds issued for erection of a city hall were valid debt against the city and would have to be paid. See only evidence on this point. Tr. p. 36, and transcript from Comptroller's office p. 24.

ARGUMENT.

The judgment of the court is silent as to which one of the defenses it is based upon, we therefore deem it necessary to discuss in our argument each proposition presented by the defendant on the trial of this cause.

We first direct the court to the plea of non est factum. It is claimed by defendant that the bonds in suit were not signed till the third day of July, 1884, and that W. N. Hodge, who signed them, had ceased to be mayor. This is true, but we call attention to the fact that at the date of these bonds, to-wit: On the first day of January, 1884, W. N. Hodge *was* the mayor. The plaintiff was an innocent purchaser for value. He is not bound to look beyond the bonds themselves and the enabling acts authorizing their issue, and if there is lawful authority to issue them, and the city appears to have acted upon this authority, he need go no further, no matter what may have been the real motives that lay behind their issue nor what irregularity may have characterized the acts of the officers uttering them for the city. When the plaintiff in this suit contemplated the purchase of these bonds, he found the authority for their issue recited on their face, to-wit: Art. 420 of the Revised Statutes of the State of Texas and the ordinance adopted September 13, 1883, in conformity to said article. An examination of these acts of authorization show that the city had the right to issue them, and they conform in every particular to the requirements of this grant of power. There was nothing whatever to give the plaintiff either actual or constructive notice of any defect or irregularity. If he examined the Statutes of the State and the ordinance authorizing it, he found the power to issue. If he examined the records to see who was the mayor and who was the secretary on the first day of January, 1884, he found W. N. Hodge was the mayor and W. H. Graves was the secretary. If he examined the bonds he found that they had been registered by the Comptroller, and he had a right to presume that they had been forwarded to the Comptroller by the mayor as the law provides or the Comptroller would not have registered them. In the case of Weyauwego vs. Ayling, 99 U. S. p. 112, this Hon. Court holds that a town having uttered its bonds is

estopped as against a bona fide holder for value to show that the true date of the bonds is different from that named on them, or that the town clerk who signed them was not in office when he signed them, if he was in fact such officer at the date of the bonds.

This doctrine is the only one that is consonant with reason and justice, any other would permit a party to take advantage of his own wrong and would unsettle an unbroken line of decisions on the subject of negotiable paper which lead up to this principle from the very distant past. Both the signature of mayor and clerk or secretary being required by law, one is as necessary as the other, therefore, the above decision is directly in point and is conclusive of this feature of the defense.

If plaintiff had received any notice of this irregularity we would feel constrained to argue a proposition based upon the fact that the ordinance of September 13, 1883, is a part of the contract for and authorizing the issue of these bonds; that it provides that they be lithographed and signed forthwith by the mayor (W. N. Hodge) and secretary, ready for delivery January 1, 1884, when interest was to commence running, and that the signing of these bonds by W. N. Hodge after he ceased to be mayor, was authorized by a resolution of the city council, but in view of the case as made, we do not think this court would find either the necessity nor inclination to consider the later proposition.

The defense which seems more forcible and which no doubt entered more largely into the reasoning of the court in its judgment for defendant than any other, is the one of ultra vires or excessive issue. In the body of this brief we have submitted several propositions which are very full upon this feature of the case and it is unnecessary to repeat them here. There is one position which we take that would obviate all others if we are correct. That is, the proof fails to show any over issue and the lower court could not have based his judgment on this defense. The burden of proof was upon the defendant. The only proof made is as to the *assessed valuation* of property in 1883 and 1884, and that there was a bonded debt of $20,000, bearing 8 per cent. interest per annum, prior

to September 13, 1883, date when these bonds were authorized. No proof was made as to the annual amount of debt necessary to be raised by taxation, therefore those sections of the constitutions and laws prohibiting the making of a debt of this nature, unless provision is made at the same time for levying and collecting a sufficient tax to pay the interest there on and 2 per cent. as a sinking fund, could hardly enter into this case. If we are mistaken in this we say that nevertheless this is a debt incurred, if not by execution, at least by ratification subsequent to the amendment of Sec. 9, Art. 8, of the constitution of the State of Texas, and under the enlarged powers of this amendment the city could meet its interest and the 2 per cent. sinking fund without exceeding the limit prescribed.

But it seems to us, and we respectfully submit to this court, that the entire question of over issue as presented in this record, must depend upon the proviso in Art. 420 of the Revised Statutes.

Did the aggregate bonded debt of the city, including the bonds in suit, exceed six per cent. of the value of the property within said city subject to ad valorem tax? If the word value as used in the article referred to means assessed value. then there is no doubt but that there is an over issue, but we contend that no such construction can be indulged. There is nothing in the context and nothing in the wording of the law to warrant any other construction than a settled determination of value. If the legislature had intended to provide the *assessed value* they would have said so, and when it is considered that a number of the States do use the phrase *assessed value* instead of value, it is fair to apply the maxim *Expressio Unius est Exclusio Alterius,* and say our legistature intended that the issue of bonds should not exceed six per cent of *actual* value and not six per cent of the *assessed* value. The question of value then becomes a matter of proof to be made in the ordinary and usual way. This construction is just. A city council may not assess its citizens one-half the value of their property, and indeed it may not have assessed at all at a time when it decides to issue bonds. Could it be said, because there was no previous assessment, no bonds

could be issued, or if issued and a subsequent assessment should fall short of the bonded debt, the bonds would be void, the owner could not show the real value. Such a law would be a snare and a delusion, and offer a premium on fraud. Justice, speaking through the court, it seem to us must say to the city, "You can not use this word as a trap; you have issued your paper and gotten value for it; now you must assess your property as the law requires, to-wit: Its full, fair value and pay this debt, or else show that such an assessment would still exceed the amount authorized under the law."

The proof in this case shows that the real value in 1884, was at least $1,430,500, while the bonded debt is only $71,000.

Another fact on which we strongly rely in answer to the plea of over issue is the registration of these bonds by the Comptroller.

The Statutes, Arts. 423 and 424, provide, that whenever any bond or bonds are issued, the mayor shall forward the same to the Comptroller of public accounts of the State, whose duty it shall be to register said bonds in a book kept for that purpose, and to endorse on each bond his certificate of registration. It is the duty of the mayor at the time of forwarding any bonds for registration, to furnish the Comptroller with a statement of the value of all taxable property, real and personal, in the city, also with a statement of the amount of tax levied for the payment of interest and to create a sinking fund. The evident purpose of the statement provided in Art. 424, is to enable the Comptroller to judicially determine, not only the tax necessary to be levied, but the very questions raised by the defendants in this suit. The act of registration may have in view the special protection of the city, but the certificate of registration on the bonds, it must be considered, is devoted exclusively to the protection of third parties who may be disposed to deal in such paper.

Is it the duty of such a party to inquire into the evidences on which this high and trusted officer has made his certificate? Must he inquire if the mayor has performed his duty in forwarding bonds and data and then go into the register of bonds to see if the issue is or is not excessive? If this be so, the certificate of the Comptroller is a nullity, it is a waste of time and

There is such a complete failure of evidence to support the judgment on this ground that we do not consider it could have influenced the court in the least degree. The city accepted the works and is still using them; it made executed and delivered its bonds and they became the property of a bona fide holder for value before maturity. That the city can not now be heard to set up such a defense as this, is a proposition, which, if argued before this court, would be an inexcusable reflection on its intelligence. Our only excuse for its mere mention must be that it is a feature of the defense.

In view of the fact that the court did not deliver a written opinion, we have considered it proper to discuss every feature of this case. It is a principle of law as old as it is just, that where an agent has exceeded his authority and either the principal must suffer or he who has dealt with him; he who has clothed him with apparent authority and put the agent in a position to injure others, ought to bear the loss and not the party who has dealt with him. In this case the only possibility of loss is against the plaintiff. The city has accepted the works, operated, sold them and appropriated the proceeds.

Will the courts give countenance to such a ~~cause~~ Course and lend the law to a flagrant injustice? That they have never done so in all the past gives assurance that they never will in the future. In view of the authorities presented and the facts as discussed in this record, we respectfully submit that this ~~course~~ Cause should be reversed and remanded and we so pray.

Respectfully submitted,

HERNDON, CAIN & GARRISON,

Att'ys for Pl'ff W. N. Coler, Jr.

Wm J Herndon atty
for Plff in Error

IN THE

Supreme Court of the U. S.

of America, Washington D. C.

W. N. COLER, Plaintiff in writ of Error,

vs.

THE CITY OF CLEBURNE, Defendant in Writ of Error.

Brief of Defendant in Error.

CLEBURNE, TEXAS.
CHRONICLE BOOK AND JOB PRINT.
1888.

IN THE

Supreme Court of the U. S.

of America, Washington D. C.

W. N. COLER, Plaintiff in writ of Error,

vs.

THE CITY OF CLEBURNE, Defendant in Writ of Error.

Brief of Defendant in Error.

This is a writ of error sued out by plff. in error on a judgment rendered in the Circuit Court of the United States for the northern District of Texas, on the 23rd day of February, 1887. The suit in the court below, was brought by the plff. against the deft., to recover on two hundred and thirty-four coupons of the value of thirty-five dollars each, aggregating the sum of eight thousand one hundred and thirty dollars,

which coupons were each cut from a series of fifty-one bonds of one thousand dollars each, which purported to have been executed by the deft.

The deft. for answer in said court, filed first ; a plea of "non est factum"—second ; a plea of "ultra vires" and third ; a plea hf failure of consideration. On the trial a jury was waived by the parties, and the matters, both of law and fact, submitted to the court, which found generally for the deft., whereupon the plff. made a motion for a new trial, which was overruled by the court, presented and had allowed a bill of exceptions, assigned error procured a writ of error, filed bond and brings the case on the record as above shown to this Honorable Court, and seeks, a review and reversal of the judgement of the court below.

The court did not err, as charged in the first, second and third assignments of error. The court did not err in overruling plff's demurrer to deft's plea of "non est factum." Because the Revised Statutes of Texas, art. 422, which recites as follows : "Said bonds shall be signed by the mayor and be counter-signed by the secretary, and payable at such places and at such times as may be fixed by ordinance of the city," and art. 423 says, that it "shall be the duty of the mayor whenever bonds are issued, to forward them to the comptroller of accounts for registration," and art. 424 says, "that it shall be the duty of the mayor at the time he forwards bonds for registration, to furnish the Comptroller with a statement of the value of taxable properay, real personal, in the city, none of which thing were done by the mayor of deft.

FIRST.

The above recited articles places the power of signing the bonds in the hands of the mayor, and not in the city council, and it is made the duty of the mayor to forward them, before the delivery to the comptroller for registration, and to furnish the comptroller with a statement of the value of all taxable property real and personal; in the city, all of these things were subsantial requirements of law, and the plff. was bound to take notice of their performance by the proper officer.

SECOND.

The bonds were dated January 1st, 1884, but were not signed in fact until July 3rd, 1884, and were then signed by W. N Hodge, who had long before ceased to be mayor of deft., and. who was authorized to sign them by the city council, and not by their acting mayor. Bonds thus signed are in legal effect forged.

THIRD.

Parties purchasing municipal bonds must take notice of all the requirements of the law, authorizing the issuance of the bonds they purchase. The State having prescribed the form in which bonds should be executed, it is necessary that that form be pursued in order to bind the deft. for their payment.

STATEMENT.

The plea of non est factum amongst other things contained this averment. "That the pretended bonds and coupons mentioned in plff's petition never had any existance prior to the 3rd day of July, 1884. That they were never signed by J. M. Odell, the legally qualified and acting mayor of deft. or by his authority, or by any person authorized by law to act as mayor of deft,, and that said J. M. Odell mayor, as aforesaid at all times refused to sign the same. That although said pretended bonds and coupons on their face, purport to have been executed on January 1st., 1884, and to be signed by mayor of deft., in truth and in fact they were executed on the 3rd day of July, 1884, and were antedated and signed by one W. N, Hodge, a private citizen but formerly mayor of deft., whose term of office had long since prior to said time expired.

It was not error in the court to hold that the plea of ultra vires was sufficient, as alleged in plff's fourth assignment of error. Because the bonded debt of the city at the time of the issuance of the bonds was largely in excess of 6 per cent, of all the taxable property, real and personal, within the limits of said corporation for the year 1883, which debt may be shown as follows; $1695.25 int, at 8 ℘c. city script, issued to the Gulf Colorado & Santa Fee Ry., $5000 at 8 ℘c. int. to Gulf C. & S. F. Ry., $20,000 bonds at 8 ℘c. int. for city ball, $51,000 bonds for water works now in litigation, making a total of $77, 695,25. The taxable values for that year in said city, amounted only $975,169 on all property real and personal, as shown by the official assesment rolls of said city, and therefore exceeded 6 per cent. of the value of taxable property in said city for said year by $19175.00. The value of the taxable property in said city for the year 1884, both real and personal, being only one million one hundred and forty-four thousand four hundred dollars. The contract for constructing the water works

was executed on the 13th day of Nov., 1883, before the constitution was amended, and is to be construed by the laws existing at the time, and by the constitutions and laws in force, when the contract was made; the issuance of the $51,000 bonds made the debt greatly in excess of 6 per cent. of the property subject to taxation within the city, and the bonds were therefore void for want of power in the city to execute them. Nor can the act of the comptroller be considered a judicial act, he was simply required by law to register the bonds, which is shown by his endorsement, "registered July 12th, 1884." The object of his registration was not to give validity to the bonds, but to keep an official registry in his office of the amount of indebtedness against each municiplity, which whould serve as a guide in making assesaments to provide for payment of interes, sinking fund, &c. He does not certify on the bond that all of the conditions and prerequisites of the statute had been complied with. In fact he gives no certificate, and consequently certifies to nothing but the fact of registration. Art. 423 of the Revised Statutes of Texas; says that "it shall be the duty of the mayor, when bonds are issued, to forward the same to the comptroller of public accounts of the state, whose dnty it shall be to register said bond or bonds in a book, keep for that purpos, and to endorse on each bond so registered his certificate of registration, and to give at the request of the mayor his certificate certifying to the amount of bonds so registered in his office up to date." Art. 424, says that it shall be the duty of the mayor at the time of forwarding any of said bonds for registration to furnish the Comptroller with a statement of the value of all taxable property, real and personal in the city; also with a statement of the amount of tax levied for the payment of interest and to create a sinking fund. It is hereby made the duty of the Comptroller to see that a tax is levied and collected by the city, sufficient to pay the interest semi-annually on

all bonds issued, and to create a sinking fund sufficient to pay said bonds at maturity, and that said sinking fund is invested in good interest bearing securities."

Art. 420 Revised Statutes of Texas is as follows: To appropriate so much of the means of the city, emanating from whatever source, for the purpose of retiring and discharging the accrued indebtedness of the city, and for the purpose of improving the public markets and the streete, erecting and conducting city hospitals, city hall, water works, Etc., as they may from time to time deem expedient, and in furtherance of these objects, they shall have power to borrow money upon the credit of the city, and issue coupon bonds of the city therefor, in such sum or sums as they may deem expedient, to bear interest not exceeding ten per cent. per annum, payable semi-annually at such places as may be fixed by city audinance, *provided* that the aggregate amount of bonds issued by the city, shall at no time exceed six per cent. of the value of the property within said city, subject to advoloram tax."

FIRST.

The registration of the bonds by the Comptroller, cannot be construed into a recital, showing that all of the conditions precedent to their issue had been complied with, and on a question of excessive issue, it is wholly immaterial how the endorsement may be construed, for whoever buys where there is an excessive issue, does so at his peril, whether the bonds contain recitals or not, showing a compliance with the law governing their issue.

SECOND.

Parties buying municipal bonds are required to take notice as to whether or not there is power to issue them, and they must always take the risk of constitutional limitations on the power of a municipality to issue bonds, as well as of the official assessments, showing the value of taxable property within the municipality.

THIRD.

Where there is no power to issue bonds in excess of six per cent. of the taxable values of property, real and personal in a municipality, the bonds so issued are void, and no recitals in the bonds or otherwise, can cure the defect, or take the place of the official assessment.

FOURTH.

The purported bonds in this case are void, beceuse when the $51,000 are added to the previous existing bonded indebtedness of the deft., the debt so augumented will exceed six per cent. of the value of the property, real and personal, subject to taxation within said city of Cleburne.

FIFTH.

Cities and towns of 10,000 inhabitants or less, have no power

to levy taxes exceeding ¼ of one per cent. except such other tax as may be necessary to create a sinking fund for the payment of valid subsisitng debts, incurred prior to the adoption of the constitution of 1876, for the State of Texas, for which indebtedness such city or town may issue bomds, but for no other purpose.

STATEMENT.

Sec. 4 art. 11, constitution of 1876, reads as follows: "Cities and towns having a population of ten thousand inhabitants or less, may be chartered alone by general law. They may levy, assess and collect an annual tax, to defray the current expenses of their local government, but such tax shall never exceed for any one year, one fourth of one per cent. and shall be collected only in current money"— * * *

Sec. 5 and 11, says cities and towns having more than ten thousand inhabitants, may have their charter granted or amended by special act of the legislature, and may levy and collect such taxes as may be authorized by law, but no tax for any purpose shall ever be lawful for any one year, which shall exceed two and one half per cent. of the taxable property of said city. * * *

The amendment to sec. 9 art. 8, of the constitution of the State of Texas, is as follows: "The state tax on property exclusive of the tax necessary to pay the public debt, and of the taxes provided for the benefit of public free schools, shall never exceed thirty-five cents on the one hundred dollars valua-

tion, and no county, city or town shall levy more than twenty-five cents for city or county purposes, and not to exceed fifteen cents for roads and bridges on the one hundred dollars valuation, except for the payment of debts incurred prior to the adoption of this amendment, and for the erection of public buildings, streets, and other permanent improvements, not to exceed thirty-five cents on the one hundred dollars valuation in any one year, and except as in this constitution is otherwise provided. This amendment was voted upon august 14th, 1883. The Governor's proclamation announcing the result was issued Sept. 25th, 1883.

The repealed section reads as follows: Sec. 9, "the state tax on property, exclusive of the tax necessary to pay the public debt, shall never exceed fifty cents on the one hundred dollars valuation, and no county, city or town, shall levy more than one-half of said state tax, except for the payment of debts already incurred, and for the erection of public buildings not to exceed fifty cents on the one hundred dollars, in any one year, and except as in this constitution, is otherwise provided."

It was shown that at the time the contract was made to construct the water works, to-wit, the 13th of Sept. 1883, that the debt of the city that year, exceeded 6 per cent. of the taxable values in said city on all property, real and personal, subject to taxation, by nineteen thousand one hundred and eighty-five dollars. That J. M. Odell, mayor of deft., when the bonds were presented to him, refused to sign more than forty of them, and he was therefore excused from signing any of them, and

the city council by a resolution authorized W. N. Hodge to sign them, who had been mayor at the time the contract to build the water works had been entered into, notwithstanding his term of office had expired about four months before the date of signing. That the mayor Odell, also refused to send to the Comptroller the bonds for registration, and refused also to send to him his certificate, showing the taxable values of property, both real and personal, within the city limits of Cleburne.

It was further shown that the bonds were forwarded to the Comptroller by some person other than the mayor, and it is presumed were delivered by some unknown person to the party entitled to them, and that they were registered by the Comptroller upon the exparte statement of certain individuals, who give it as their opinion, that the value of the property, both real and personal of the city of Cleburne, is fully two millions of dollars : (Record p. 34–35.)

AUTHORITIES.

Antony vs. Jasper, 101 U. S. 698.

Ogden vs. the county of Davis, 103 U. S., 641.

Dillon on Municipal Corporations, val. 1, 449.

Boone on Corp., Pars. 44, 298–595.

LawrenCe vs. Woods, 102 U. S., 153.

Mchi. Exchange Bank vs. Chosens free holders of the county of Bergen, 115 U. S., 430.

Buchanan vs. Litchfield, 102, U. S., 138.

Dixon vs. Marshall Field, 111 U. S., 360.

Litchfield vs. Ballew, 114 U. S., 132.
U. S. vs. Cenkepoir, 99 U. S., 331.
Ind. School Dist. vs. Stone, 109 U. S., 90.
Sheboygan Co. vs. Parker, 3 Wall., 93.
Hoff vs. Jasper Co., 110 U.S., 53–28.
Parkerburg vs. Brown, 106 U. S., 487.
Knox Co. vs. Aspinuall, 21 Howard, 539.
Konx Co. vs. Wallace, 21 Howard, 546.
U. S. vs. Macon Co., 99 U. S., 582. Crow vs. Oxford.

ARGUMENT.

The propositions presented by deft. in the trial of the cause in the court below, were three in number as follows: First, a plea of non est factum—Second, a plea of ultra vires—third a plea of failure of consideration. In the discussion of them, we will reverse the order, and present first, the plea of non est factum; second, the plea of failure of consideration, and third the plea of ultra vires.

The plea of non est factum was met by the plff. in the court below by exceptions, setting forth that the plea was special, and failed to "exclude the idea that the deft. had authorized the person who actually signed the bonds and coupons to do so." The plea of non est factum amoung other things, recite that the coupons and bonds mentioned in plff's petition, and said entire series of fifty one bonds and coupons thereto attached, of which those mentioned in plff's petition are a part, are not the obligation, bonds and coupons of deft. and were never executed and delivered by deft. Because deft. by its said mayor, avers that the pretended bonds and coupons mentioned in plff's petition, never had any existence prior to the 3rd day of July, 1884. That they were never signed by the said J. M. Odell, the then legally qualified and acting mayor of deft, or by his authority, or by any person authorized by law to act as mayor of deft. That he never forwarded to the Comptroller his certificate, showing the taxable values of property, real and personal, in said city for the year 1884, and never authorized any other person so to do. That if said pretended bonds and coupons have ever been registered in the Comptroller's office, such registration was illegal and without any authoriny, because they were never forwarded bo the said J. M. Odell mayor, as

aforesaid, to said Comptroller, nor by any person authorized by him so to do. That said pretended bonds and coupons were never delivered by said mayor, or by his authority, or by any person authorized to act as mayor of deft., to the Texas Water & Gas Company, or to any other person or persons.

By article 422, R. S., the power to sign the bonds is placed in the mayor, and not in the city council, the time and place of payment alone, is given to the city council; and by art 422. it is made the duty of the mayor before delivering the bonds, to send them to the Comptroller for registration, and at the same time furnish the Comptroller a statement of the values of taxable property, real and personal, within the city limits. The execution of the bonds then, and the transmission of them, together with the evidence, showing the value of taxable property within the city, is by statute placed solely in the hands of the mayor. The power is vested in hin to do and to perform each one of the several prerequisites necessary to give validity to the bonds. Can the council usurp this power, authorize a priveate citizen to execute them, deliver the bonds before registration, and have them registered, either by the holder or some person empowered by him upon the certificat of "leading citizens," as to their opinion of the value of all of the property, real and personal, within the city of Cleburne. ?

The plea of non est factum, charged that the mayor neither signed the bonds, nor delivered them, nor sent them to the Comptroller, nor furnished that official with the requisite certificate to authorize their registration, nor did he authorize any other person to do and perform those things required of him by law, nor were those things so necessary to the valid execution of the bonds, done by any one authorized by law to

perform them. Would he as mayor be required to "negative the idea that they may have been signed by a person authorized by deft. to sign them," What right had the deft. to authorize any other person to sign them? Was the power to sign in the council? If so, the council could have signed them or could have authorized the street commissioner, or the secretary to have signed them, either in their own names, or in the name of the acting mayor, who had refused to sign them. We respectfully submit that the law granting the right to a municipality, to fasten a debt upon the citizens, surrounded the exercise of the power with certain rules and restrictions, intended to operate as a protection to the citizen, against the abuse of the high privileges granted them, and very wisely divided the several duties to be performed between the several co-ordinate branches of the city government. To the council is given the power to create the debt, and fix the time and place of payment, and to the mayor, to execute the bond which is the evidence of the debt, to deliver it and to have it registered by the proper officer, upon the evidence he furnishes of the taxable values of property within the municipality. And bonds issued, executed, delivered and registered by the city council alone, or its agents, upon the refusal of the mayor to perform the duties assigned to him, and over his protest, are void in the hands of any person whomsoever, for the holder of municipal bonds is bound to take notice of all of the requirements of law, as well as of the official character of the persons who execute and deliver them.

This view is well sustained by former decisions of this Hon. Court, will be admitted we think, by referring briefly to a few leading cases on this question. In the case of Antony vs. Jasper, 101 U. S., 698, it was held that it was in the power of a state to prescribe the form in which municipal bonds shall be executed, in order to bind the public for their payment. If

not so executed, they create no legal liability. Dealers in municipal bonds are chargeable with notice of the laws of a state, granting power to make the bonds they find on the market. Purchasers of municipal bonds must always take the risk of the genuineness of the official signature, and of the official character of those who execute the paper they buy. Bonds not issued by proper authority are in legal effect forged. Municipal corporations can act only through its authorized agent, and it is not bound until all who are to participate in what is to be done, have performed their respective duties. Agents have only such power as are specially granted by law.

In Ogden vs. County of Davis, 102 U. S., 641, it is said that the holder of municipal bonds are chargeable, with notice of all the statutory provisions under which they were issued.

Dillon on Municipal Corporations, vol. 1, 449, says that whenever the mode of contracting is specifically and plainly prescribed and limited, that mode is exclusive and must be pursued, or the contract will not bind the corporation.

In Lawrence vs. Woods, 102 U. S., 153, it is decided that bonds antedated to avoid requirements of law, are invalid in the hands of any person. The bonds under consideration were signed by the ex-mayor, by order of the city council, four months after he had vacated his office, and which was done with a view to meet the refusal of their acting mayor to sign them, and they were permitted to bear date of the time when the ex-mayor was the acting mayor of deft.

In Mcht. Exchange of N. Y. vs. Board of Chosen free holders of Bergen Co., 115 U. S., 420, Mr. Justice Field, in delivering the opinion of the court said: There was evidence at the hearing of a very persuasive character, that the 78 bonds deposited with the bank, when the two loans of Boyart were consolidated, were not signed by him, and that the seal of the county was not attached until after he had ceased to be col-

lector. "If this be the fact they fall within the rule of Antony vs. county of Jasper 101, 699, where the court said that purchasers of municipal securities must always take the risk of the genuineness of the official signature of those who execute the paper they buy. This includes not only the genuineness of the signature itself, but the official charactor of him who makes it."

In Buchanan vs. Litchfield, 101 U. S., 138, the court says, a purchaser of municipal bonds is bound to take notice of the constitutional limitation upon municipal indebtedness and of the official assessments, showing the value of taxable property within the municipality. The mere fact that the bonds were issued without any recitals, that the requirements of the constitution have been complied with, is not proof in favor of a bona-fide holder, that the circumstances existed which authorized their issue.

In Litchfield vs. Ballew, 114 U. S., 132, the court said that constitution of a state, provides that no city shall be allowed to become indebted in any manner, beyond a certain per cent. of the taxable property. The prohibition is as effectual against the implied, as the express promise, and is as binding in equity, as in law.

In 90 U. S., 381, the court said that every purchaser of a municipal bond is chargeable with notice of the statutes, under which the bonds were issued. If the municipality had no power, either by express want or by implication, to raise money by taxation to pay the bond, the holder cannot require it.

In case of Ind. School Dist. vs. Stone, 109 U. S., 90, the court says, recitals if a bond that is issued by proper authority, does not import a compliance with the statute, limiting amount issued. Cinsequently deft. is not estopped from showing that the debt exceeded amount limited by the constitution and laws of the land. In this case the defense was, that the

bonds were void, because issued in excess of the limitations imposed by the constitution, as to taxable values, and the justice in rendering his opinion said, that judgement should have been entered for the district. To what extent, if any, the dist, may be held responsible in some other form of proceeding, is a question not now before us, and to which we express no opinion.

Surely the plea of non est factum was as full and complete as would be required of the mayor of deft. and the court, who heard both the law and the facts, failed to sustain plff's exceptions on final hearing, and we think correctly so, in view of the law and the authorities above cited, which in our judgment should fasten upon plff. notice, that none of the prerequisites prescribed by law had been performed by the only person authorized to perform them, before the bonds were issued and exposed for sale in the market, and as the facts set forth in said plea are not contradicted, but admitted by the plff. the judgment of tne court, if rendered on the facts contained in said plea, would be amply supported by the law and authorities.

The plea of failure of consideration sets forth, among other things, that the Texas Water & Gas Company agreed to furnish and place in the ground along the different streets, in the City of Cleburne, 4¼ miles of water mains or tubing, which it bound itself to construct of piping or tubing, known as the McKeerfort wrought iron white metal pipe, with converse patent lock joint, of sufficient thickness and strength to resist a pressure of 200 lbs. to the square inch, after they were put in the ground which was necessary, in order to operate said wa.

ter works successfully, but that said company did fraudulently, and with intent to swindle and defraud deft., in the construction of said water works, put in the ground, in the City of Cleburne, and along and in her streets as water mains, for the full distance of 4¾ miles, thin, frail, weak, worthless and rotten iron tubing, and that upon repeated attempts to test said water works and to operate them, when it became necessary to apply steam pressure to said water mains, it was discovered that said water mains were altogether too weak to resist the amount of pressure necessary to work them, and that on or about

day 1884, and at divers other times too numerous to mention, since that date, and on every occasion since said date, whenever said system of water works has been used for fire purposes, or for testing capacity of same, with a pressure only of 120 lbs. to the square inch, said mains or iron tubing has been unable to resist said pressure, and on every said occasion has yielded or bursted on the application of said power, springing leaks at numerous places throughout the entire length of lines, and are now fast rotting out and becoming wortnless, to such an extent, that deft. will be required in a short time to replace the same with new piping in order to operate same. That said system of water works by reason of said defective water mains, is almost worthless, which defects were unknown at the time of the issuance of said bonds, and that to replace them would cost deft the sum thirty one thousand three hundred and fifty dollars, and that plff. had full notice of the worthlessness of said water mains at the time he purchased said coupons and bonds, if he did purchase them, which deft. denies, and deft. specially avers and charges that plff. is not an innocent purchaser and holder of said coupons for value, and the consideration for the issuance of said bonds and coupons, if it should be held they were issued by deft., had failed in part, and deft. pleads a failure of consideration for the is-

sue and delivery of said bonds and coupons, to the extent of $21,350, which plea was duly sworn to by J. M. Odell, mayor of deft.

We have thus substantially copied the plea of failure of consideration, in order to reply to a part of plff's argument found on page 24 of his brief, as this is a plea of partial failure of consideration, and the court found generally for deft. It is reasonable to presume that this plea and the proof under it did not necessarily control the court in the judgment it rendered, but plff. in his argument above refrred to; says that there is such a complete failure of evidence to support the judgment on the ground that we do not consider it could have influenced the court in the leat degree, and that his only excuse for mentioning it, is because it was a feature of the defense. Now we respectfully submit to the court, that we do not understand that all of the evidence introduced on the trial in the court below, is now in the record before this court. There is no statement of facts, no were there special findings by the court, and plff. will certainly not contend that the bill of exceptions filed in this cause, contains all of the evidence heard by the court in the trial below. We are willing to concede that there is but little evidence in the bill of exceptions, in support of the plea of failure of consideration, but in the absence of a statement of facts deft. might claim the benefit of the presumption if necessary, which following the example of plff. might be truthfully asserted, that the truth of the plea was substantially proven, especially as to the worthliness of the water mains upon the trial of the cause in the court below.

But passing from this subject, which we think immaterial. We will now proceed to discuss the plea of ultra vires,

and though we believe that the law and the facts are sufficient to sustain the judgment of the court on the plea of non est factum. Yet we think that on the plea of ultra vires, there can be no question but that the judgment of the court is a abundantly supported by the record, and should be in all things affirmed by this Honorable Court.

It is very evident that soon alter the contract was entered into by deft. and the contractor, to build the water works, a disagreement arose between the new mayor and the aldermen, or a part of them, as to the policy or power of the city government, to carry out the contract and to issue the bonds, resulting when the time came to sign the bonds, in the refusal of the mayor to sign them, or at least not more than forty of them, believing as it is presumed he did, that to sign more than forty of them, would make an excessive issue and be consequently ultra vires, This refusal on the part of the mayor to sign, in whom that power was alone vested by law, would to an ordinary assembly of law makers, present a serious question, but the aldermen of Cleburne saw no difficulty whatever, in the supposed contumacy of their chief, and on examination of the bonds, saw that they were dated at a time when Hodge had been mayor, several months before, and at once passed a resolution that he should sign, and the bonds were executed; but another difficulty presented itself, the bonds before being delivered, are required to be sent by the mayor to the comptroller of public accounts for registration, and he was also required to send to the same official, a statement of the property subject to taxation, both real and personal, within the city limits, this the mayor also refused to do, and the bonds were delivered to the contractor, either by Hodge, the ex-mayor or the city council, before registration, and without any statement to the Comptroller, showing the taxable values of property, real and personal, within the City

of Cleburne. If the city council had authority to designate who should sign the bonds, they could by a like exercise of power have instructed Hodge to forward them, together with a statement of taxable values, to the Comptroller for registration. Why then was this not done? Simply because a proper statement taken from the assessment rolls of the city, would show that the execution of the bonde were in excess of the limitation prescribed by law, and that the acting mayor was right in refusing to sign them, when presented to him for his signature. But the holder of the bonds wanted them registered. A certificate of the value of all of the property, both real and personal, subject to taxation in the city, it seems could not be procured, either from the mayor or ex-mayor; so applipliecation was made to a few of the leading citizens of the town, and they gave it as their opinion, which they say "they have no hesitancy in expressing, that the actual value of the property, real and personal, in the City of Cleburne, is fully two millions of dollars, and we earnestly request the Comptroller of the state to register the Cleburne city water bonds." Now we respectfully submit that the only evidence of the taxable values of property must be the assessment or tax rolls; it may be imperfect, but it is evidence, and the best which the nature of the case affords. It furnishes the only available criterion by which to judge of the taxable wealth of a city. It is always and at all times prima facie proof of taxable values. It is the method prescribed by the state, and each piece of property is valued upon the affidavit of the owner, by the assessor who administers the oath, and whose action is subject to the control of a board of equalization, which by law can raise or lower the valuation as to it may seem just and proper. This is the only way known to determine the taxable values of property. Issue, it is true might be joined with each individual owner of property, and upon a hearing from both sides determine the

question as to the true value of the property owned by each, but until this should be done, we think that the formula fixed by the state, in the absence of judicial determination on a question like this, should prevail and the assessment rolls be held as conclusive proof of the value of all taxable property within the limits of a municipality, and must unquestionably be the basis on which all calculations are made, and all limitations determined. Holding these views and believing them to be correct, we are not a little surprised at learned counsel in gravely contending that the loose, vague and uncertain opinions of citizens, who without examination, guess at the valuation of property in a city, should be considered rather than the assessment rolls, but this surprise becomes astonishment, when upon an inspection of the so called certificate of taxable values, we find that it embraces all property of every description whatsoever, and therefore including in their estimate, the court house, school houses, churches and all other public buildings, besides a long list of valuable personal property, which a liberal state government has exempted from taxation and which may be variously estimated in cities of the size of deft. from one hundred and fifty thonsand to a half million of dollars. This pretended certificate then, even if it had any merrit as evidence, does not offer to give any estimate whatever, of the value of the taxable property, both real and personal, within the city limits of Cleburne.

But plff. contends that the bonds were registered, and that the fact of registration should protect a purchaser, who finds the bonds on the market and invests his money in them. This might be true in certain states, where the law requires the auditor, registrar, presiding officer at elections, or county judges, to not only resister, but to certify that all of the conditions prescribed by law as prerequisites to the issuance of the bonds have been complied with, but it would only be true in those

states, in cases of defective execution, or other irregularity attending their issue, but certainly not in cases where there is an over issue, or other limitation or want of power in the government to issue them. In the case before the court however, the Comptroller gives no certificate except the fact of registration, which can neither add to, nor take from the validity of the bonds, but leaves the purchaser to investigate for himself, as to whether or not all of the precedent conditions required by law, had been complied with in the issuance of the bonds. We think that we have shown that the bonds were not only illegally registered, and that the reason for their illegal execution and registry, was to avoid the very question of excessive issue. If the fact of registration was material to the validity of the bonds, the plff. was bound to take notice that they were registered contrary to law, and likewise, if the bonds were executed in excess of the limitation prescribed by the statute, he was also bound to take notice of that fact, and the deft. is not estopped from showing the existence of these several facts, even against a plff. claiming to be an innocent purchaser of the bonds for a valuable consideration.

But were the bonds an excessive issue. Did they when added to the prior existing indebtedness of the city, exceed the limit prescribed by law? If so, they are void in the hands of any person. Plff. concedes in his argument, page 20; that "if the word value as used in the article referred to, means assesed value, then there is no doubt but that there is an over issue." Now it would be fair to assume that the legislature meant simply what it said. It must have had assessed value in its mind, for no other device had yet been fallen upon by our legislature, to determine taxable values, but by an assessment. The history of our revenue laws, show this. No tax is levied without an assessment, and it is by an assessment of the property throughout the state, that the taxable wealth of

the state is determined. How would it be possible to arrive at the value of property in a state, county or city, but by an assessment? Is it not the most reliable as well as the only established method of reaching a definite conclusion on the subject? By an assessment, each property holder is sworn to render his property correctly. If he does not do so, his assessment might be raised, and he might in certain cases be subjected to a criminal prosecution for perjury.

It is true such evidence is exparte, but is it not the best evidence of which the nature of the case is susceptible? Are not the stements of each property holder under oath, better evidence than the unsworn opinions of individuals, who guess at the probable valnes of property in a city? If the legislature did not mean assessed value; is it possible it could have meant to permit the vague, uncertain and unreliable opinions of a few individuals to be used as a substitute?

In the present case however, we have previously shown that the pretended certificate relied upon by plff., did not certify to value of the property, both real and personal, subject to a taxation, in the City of Cleburne, and is therefore worthless in this case, even though the method might be claimed to have some merit as a rule of evidence. There being then no other evidence before the court, but the assessed value of the property subject to taxation, in the City of Cleburne, and by the assessment it was shown that the debt of deft., augmented by the fifty-one water works bonds, exceeded six per cent. of the values of all taxable property in said city by $19,185,00, the bonds are void on the ground of excessive issue. Counsel for plff. insist that though the contract to build the water works was made on the 13th of September, 1883, and the constitutional amendment did not go into effect until the 25th of September, 1883, yet the water works debt was incurred, if not by execution, at least by ratification subseqnent to the amendment

of Sec. 9, Art. 8, of the Constitution. We do not think it necessary to discuss this proposition. The debt of the city, including the debt for which the water works bonds were executed, was created before the amendment to the Constitution was adopted, and was independent of it, and was governed, controlled and the rights of the parties settled under the Constitution as it existed at the time the several debts were created; that they were all valid, subsisting debts, for ihe payment of which, with interest, a tax had to be assessed and collected from the citizens of deft., admits of no controversy. (See Waxahachie vs. Brown, 68Tx.) We therefore conclude that on this feature of the case there is nothing wanting to support the findings and judgment of the Court.

But there is another phase of the defense under the plea of ultra vires that seems to have been ignored by the pltff., but which we think conclusive of the case. This feature of the defense is given in the fifth proposition submitted in this brief by deft. and is as follows: "Cities and towns of ten thousand inhabitants or less, have no power to levy taxes exceeding one-fourth of one per cent, except such other tax as may be necessary to create a sinking fund for the payment of valid subsisting debts incurred prior to the adoption of the constitution of 1876 for the state of Texas, for which indebtedness such city or town may issue bonds, but for no other purpose."

Sec. 4, art. 11, constitution 1876, reads as follows: Cities and towns having a population of ten thousand or less may be

chartered alone by the general law. They may levy and collect an annual tax to defray the current expenses of their local government, but such tax shall never exceed for any one year ¼ of one per cent. and shall be collectable only in current money.

Section 9, art. 8, of the constitution, beford it was amended as well as after it was it was amended, applied exclusively to towns and cities having more than ten thousand inhabitants. In both sections there appears an evident intention not to interfere with other sections, which prescribe a different rule for cities and tows having ten thousand or less inhabitants, for both the old and amended sections, contains a provision limiting the power conferred in each so as not to interfere with other provisions limiting the power of taxation as may "be otherwise provided for in this constitution." Now deft. contends that in sec. 4, art. 11, it has otherwise provided for taxing towns and cities, having ten thousand and less population by restricting the right to levy and collect an anual tax, solely to defray current expenses of their local government; but that such tax shall never exceed for any one year one-fourth of one per cent.

Sec. 5, art. 11, prescribes a different rule for cities and towns having more than ten thousand inhabitants, for these classes of cities may have their charters granted or amended by special act of the legislature, and may levy and collect such taxes as may be authorized by law, but no tax shall ever be lawful for one year, which shall exceed two and one-half per cent. of the taxable property of said city. Here are two distinct provisions of the constitution, applicable two different and distinct clsses of cities. To a city of more than ten thousand inhabitants, is granted the right to have their charters granted or amended by special law, and may levy and collect such taxas as are authorized by law, not to exceed two and one half per cent of the tax-

able property in said city. To a city having ten thousand inhabitants or less, these priviledges are denied—It can only incorporate alone under the general law, and can only levy and collect a tax of one fourth of one per cent as an annual tax to defray current expenses of their city government and for no other purpose.

To what class of cities then does Art. 420 of the revised statutes apply; That article we have shown confers power upon the city, among other things to improve the public markets, and streets, and to erect and conduct city hospitals, city hall's, water works, etc.—And in furtherance of these objects to borrow money on the credit of the city, and issue coupons &c. Can it apply to cities having less than ten thousands inhabitants; Certainly not, because by the constitution these class of cities are prohibited from collecting a tax of more than one fourth of one per cent for cuprent expenses, and for no other purpose. If they cannot collect a tax to pay a debt, they cannot contract the debt, this we beleive is a universal rule of construcdtion. Art. 420 then must apply to cities of more than ten thousand inhabitants which may need, hospitals, city halls, public markets and water works, and which are presumed to be able to pay for them. Again by sec. 5 of the constitution the power of taxation in cities having over ten thousand inhabitants is limited to two and one half per cent, and it is further provided that no debt shall be created unless at the same time provision be made to assess and collect annually a sufficient to pay the interest and a sinking fund of two per cent. Sec. 4 refering to towns and cities having ten thousand inhaditants or less has no such provisions if Art. 420 was intended to apply to both class of cities. The smaller class of cities would have no protection, and could be taxed without measure at the will or caprice of whom soever should be in power, for the limit of two and one half per cent. upon the taxble property of the city,